

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

* * * * *

EPIC SYSTEMS CORPORATION,
a Wisconsin corporation,

Plaintiff,

Case No. 14-CV-748-WMC

vs.

TATA CONSULTANCY SERVICES
LIMITED, an Indian Corporation;
and TATA AMERICA INTERNATIONAL
CORPORATION (dba TCA America),
a New York Corporation,

Madison, Wisconsin
December 4, 2015
9:23 a.m.

Defendants.

* * * * *

STENOGRAPHIC TRANSCRIPT OF MOTION HEARING
HELD BEFORE CHIEF JUDGE WILLIAM M. CONLEY

APPEARANCES:

For the Plaintiff:

Jenner & Block

BY: RICK L. RICHMOND

NICK G. SAROS

ANNAMARIE VAN HOESEN

633 West Fifth Street, Suite 3600
Los Angeles, California 90071

Quarles & Brady

BY: ANTHONY A. TOMASELLI

KRISTIN G. NOEL

P.O. Box 2113

33 East Main Street, Suite 900
Madison, Wisconsin 53701

CHERYL A. SEEMAN, RMR, CRR
Federal Court Reporter
United States District Court
120 North Henry Street
Madison, Wisconsin 53703
1-608-255-3821

1 APPEARANCES: (Continued)

2 For the Defendants:

3 Kelley Drye & Warren LLP

4 BY: PHILIP D. ROBBEN

5 ALISON L. MACGREGOR

6 PAUL F. DOYLE

7 101 Park Avenue

8 New York, New York 10178

9 Stafford Rosenbaum LLP

10 BY: BARBARA A. NEIDER

11 222 West Washington Avenue, Suite 900

12 P.O. Box 1784

13 Madison, Wisconsin 53701

14 Also Present:

15 Erik Phelps, General Counsel

16 Mike Wokasch

17 Kaija Hupila

18 Stirling Martin

19 Brian Benz

20 *Epic Systems Corporation*

21 Vinod Verghese, Associate General Counsel

22 Ajit Menon, Chief Security Officer

23 *Tata Consultancy Services*

24

25 ***

(Called to order.)

THE CLERK: Case No. 14-CR-748-WMC, *Epic Systems*

Corporation v. Tata Consultancy Services, Limited and

Tata American International Corporation, is called for a

motion hearing. May we have the appearance, please?

MR. RICHMOND: Good morning, Your Honor. On

behalf of plaintiff Epic, I am Rick Richmond. Sitting

next to me is Nick Saros. And sitting next to him is

Erik Phelps, the general counsel of Epic. And next to

1 Mr. Phelps we also have Tony Tomaselli from the Quarles
2 firm. We have a number of other people in the room with
3 us. I don't know if you want me to introduce them. Some
4 of them are --

5 THE COURT: I think whoever you've designated as
6 your principal for your client.

7 MR. RICHMOND: It will be the four of us, Your
8 Honor, supplemented by any technical type or
9 document-type questions that you might have. We have
10 people who can answer those questions as well.

11 THE COURT: You have people from Epic?

12 MR. RICHMOND: Yes, sir.

13 THE COURT: Why don't you identify them.

14 MR. RICHMOND: From Epic, in addition to
15 Mr. Phelps, we have Mr. Mike Wokasch, Kaija Hupila,
16 Stirling Martin, and Brian Benz.

17 THE COURT: All right. Thank you. I'll hear
18 appearances for the defendant.

19 MR. ROBBEN: Good morning, Your Honor. Philip
20 Robben from Kelley Drye & Warren. With me is my partner,
21 Alison MacGregor. Seated next to her is Paul Doyle. We
22 have Barb Neider, or *Neider*, excuse me, our local person.

23 THE COURT: *Neider*. You had it right the first
24 time.

25 MR. ROBBEN: *Neider*. I'm sorry.

1 THE COURT: In any event, why don't you
2 continue.

3 MR. ROBBEN: Yeah. We have behind
4 Ms. MacGregor, this is Ajit Menon from TCS. He's our
5 representative that will speak to document issues. And
6 this is Vinod Verghese, who is the associate general
7 counsel.

8 THE COURT: Very good. Thank you. We are here
9 on three motions to compel filed by Epic. I apologize
10 for my delay in coming out. I wanted to make sure I at
11 least had a chance to understand the positions of Tata --
12 it's pronounced *Tata*?

13 MR. ROBBEN: Correct.

14 THE COURT: -- positions of Tata with respect to
15 the second and third motions as well as at least a
16 general sense of where we stand on discovery, given that
17 it appears that there may be some progress made by the
18 parties before this hearing.

19 The reason we're doing this in person and with the
20 participation of principals is that I won't say this is
21 an unprecedented number of occasions that you have been
22 before our magistrate judge without seeming progress, but
23 I would say you're approaching some of the more
24 substantial discovery disputes. And I don't understand
25 why, in a case that in some ways should be

1 straightforward, that we continue to be unable to bring
2 this to a close. I'm talking about discovery.

3 Discovery will close in January. So to the extent
4 that Tata, and certainly Magistrate Judge Crocker has
5 repeated this many times, has failed to complete its
6 obligations with respect to discovery, you may be under
7 tremendous pressure to complete that discovery within the
8 deadline. We have a trial in April and that will hold as
9 well.

10 So I don't know -- I'm not starting out by casting
11 aspersions other than by saying that to some extent, with
12 respect to certainly some of the discovery that still
13 seems not to have been provided, Tata is *behind the eight*
14 *ball*, because Magistrate Judge Crocker made very clear
15 what he expected in terms of production.

16 Having said that, I would like to close this out
17 without Epic expanding beyond what is a reasonable series
18 of requests for discovery. I say that by way of
19 preliminary because we are here with respect to three
20 specific motions.

21 The first motion is Epic's. And I have a general
22 understanding as to what it is that Epic believes it is
23 entitled to or, more accurately, is seeking. But I want
24 to make sure that the parties are on the same page as to
25 what it is that is being requested and what it is that

1 both sides believe has or has not been provided.

2 I'm going to begin with the largest of those areas.
3 And now we're dealing with Epic's motion to compel
4 discovery regarding TCS investigations, which is the
5 request for immediate production of all relevant
6 documents about investigations.

7 In response, Tata has indicated that while there
8 have been -- Epic is not inaccurately describing the
9 various investigations that have occurred with respect to
10 an HR investigation, an Audit Committee investigation, a
11 Security Department investigation and a so-called, what
12 Epic would describe as, *Kelley Drye investigation*.

13 It is the representation of Tata that the law firm
14 of Loeb & Loeb had conducted a single investigation and
15 all of the other investigations, save Kelley Drye's,
16 falls within the rubric of the larger Loeb investigation.

17 Now, that may or may not place it outside of
18 discovery, that is to say these investigations outside of
19 discovery, but I don't have a good way of determining
20 that. And even if I did, I'm not sure that the conduct
21 of Tata in failing to produce documents which later it
22 became clear were relevant, particularly with respect to
23 others who obtained information that was, for ill intent
24 or not, obtained in a manner which was not authorized,
25 and there's no dispute about that, it was not authorized.

1 And so it is Tata's responsibility to insure, now
2 having managed to prevent discovery for some time, to
3 insure that Epic does get access to the information
4 necessary to present its case at trial or frankly even in
5 summary judgment.

6 In any event, I don't see and I don't know that it
7 was provided, but do we have the engagement letter that
8 Loeb & Loeb entered into with Tata to conduct this
9 investigation?

10 MR. ROBBEN: It is not part of the record.

11 THE COURT: All right. You'll have until the
12 end of the day today to provide me with that. You can do
13 it under seal. But I want to see the actual engagement
14 letter that supposedly, and may well be accurate, created
15 this umbrella responsibility to do an internal
16 investigation on behalf of Tata.

17 And, you know, I'd be shocked, with a law firm of
18 Loeb's quality, that if they were really doing the kind
19 of internal investigation that was intended to create
20 privilege and to maintain privilege that you don't have
21 that and it's not -- it doesn't spell out exactly what
22 their role is. If that's the case, then that would give
23 me some comfort as to the allegation or assertion of this
24 broad privilege with respect to their earlier
25 investigations.

1 Having said that, I still have the problem of
2 whether or not some of this should be produced, given
3 where we are in the course of discovery and the number of
4 times that Judge Crocker has insisted upon production of
5 additional information. I do think there's been a
6 *cat and mouse* game as Epic has attempted to try to get to
7 the bottom of the information that they are entitled to
8 and I'd like to bring that to a head today.

9 Who is it that did -- let me start with Epic. The
10 HR investigation in the spring and early summer of 2014,
11 as you have described it, who is it that conducted that
12 investigation, to the extent you know?

13 MR. RICHMOND: Your Honor, all we know is that
14 the president of TCS, a man named *Suresh Muthuswami*,
15 shortly after Mr. Guionnet, the whistleblower, blew the
16 whistle, he told Mr. Guionnet that a human resources
17 investigation -- that an investigation would be conducted
18 by human resources. That's what he said. And he said
19 that when that investigation was done that Mr. Guionnet
20 would be told what happened as a result of that
21 investigation.

22 Shortly after that the head of human resources for
23 TCS for North America, a man they call -- I think they
24 call him *Narsi*, Your Honor -- the Indian names, sometimes
25 they shorten them to just a nickname or an abbreviation,

1 but they call him *Narsi* and I can find the page in the
2 brief that has his name -- but he corresponded -- the
3 head of HR corresponded with the whistleblower right away
4 and said, "We are going to do an investigation." And
5 then indeed, from what we know, that investigation was
6 done.

7 And during Mr. Muthuswami's deposition he said and
8 described that as being a separate and distinct
9 investigation. He thought that there were reports that
10 had come out of that investigation. And we've quoted it
11 in our brief, but Mr. Muthuswami said that he assumed
12 Epic had been given the reports compiling the results of
13 that human resources investigation during the course of
14 this case. And I told him, "You should not assume that
15 because we haven't obviously gotten it."

16 So that's what we know about the human resources
17 investigation.

18 THE COURT: All right. And has Tata confirmed
19 that there was an investigation done by Mr. Narsi or
20 others within a human resources department?

21 MR. ROBBEN: The investigation came out of
22 Mr. Guionnet's allegations, which included allegations as
23 to his employment and also allegations --

24 THE COURT: I didn't ask it very well because
25 I'm not -- do you know whether the Human Resources

1 Department did it's own investigation in the spring or
2 early summer of 2014?

3 MR. ROBBEN: My understanding is that
4 investigation is the Loeb & Loeb investigation.

5 THE COURT: And that is based on what?

6 MR. ROBBEN: That is based on communications
7 that I've had with the client.

8 THE COURT: With the client?

9 MR. ROBBEN: Correct.

10 THE COURT: Who at the client?

11 MR. ROBBEN: Mr. Menon, Mr. Verghese, and I had
12 a call with Ms. La Mar early on, Ms. La Mar being the
13 person at Loeb & Loeb.

14 THE COURT: All right. Was a report prepared?
15 Did someone from HR write any document?

16 MR. ROBBEN: I've never seen a document.

17 THE COURT: That's not what I'm asking you. I'm
18 asking you, as an officer of the court, can you tell me
19 whether or not a document was prepared by the Human
20 Resource Department.

21 MR. ROBBEN: I cannot.

22 THE COURT: I mean, I just -- the answer is
23 either "yes" or "no" and we're way down the line in
24 discovery. It's not acceptable for the answer to be "I
25 don't know" at this point. And there's no -- we're not

1 hiding the ball. This has been briefed repeatedly. It
2 goes back to earlier disputes with the magistrate judge.
3 I don't understand how I can't be given a straightforward
4 answer as to whether a report or reports were prepared by
5 Human Resource Department.

6 MR. ROBBEN: But the answer is that -- I guess
7 what I'm saying is the answer I think is "no" because
8 whenever I've asked, the investigation that we've been
9 told was done was the Loeb & Loeb.

10 THE COURT: Yeah, but that's a different
11 question. Loeb may well have directed all of this and it
12 may be privileged. But I'm asking whether there is a
13 Human Resource report reflecting its investigation in the
14 spring and early summer of 2014 as to what occurred here
15 in terms of accessing and downloading of the confidential
16 information. And you're telling me, as you sit here
17 today, you don't have an answer to that straightforward,
18 basic question?

19 MR. ROBBEN: There is a report about downloading
20 Epic confidential information, but it's not an HR report.

21 THE COURT: That's the distinction. So is there
22 an HR report?

23 MR. ROBBEN: I don't believe there is. There's
24 a --

25 THE COURT: And you base that on the statements

1 that you were provided by Mr. Menon and Mr. Verghese and
2 by Loeb; is that correct?

3 MR. ROBBEN: Correct.

4 THE COURT: All right. Is there a
5 representative from Loeb here?

6 MR. ROBBEN: No, there is not.

7 THE COURT: All right. Let's -- at the break
8 you will get him on the phone and he will participate in
9 this discussion. I take it that there is a Loeb report,
10 correct, a written report from Loeb & Loeb?

11 MR. ROBBEN: I don't believe a Loeb & Loeb
12 report has been created yet.

13 THE COURT: I don't know what that means, "yet."
14 They're still investigating?

15 MR. ROBBEN: My understanding is that they
16 were -- they were -- they either had not prepared a
17 report or were not distributing the report for privilege
18 concerns.

19 THE COURT: You have not seen -- if there is a
20 report, you haven't even asked for it?

21 MR. ROBBEN: I have a -- I have a memorandum
22 that TCS prepared and sent to Ms. La Mar at Loeb & Loeb
23 detailing the company's investigation that she requested
24 they do, the company's fact finding that she requested
25 they do --

1 THE COURT: "She" being?

2 MR. ROBBEN: Ms. La Mar.

3 THE COURT: All right.

4 MR. ROBBEN: -- as to UserWeb and the Med Mantra
5 allegations that Mr. Guionnet made.

6 THE COURT: And she did a memo to Loeb?

7 MR. ROBBEN: TCS did a memo to her.

8 THE COURT: And she is an attorney at Loeb?

9 MR. ROBBEN: Correct. Most of her investigation
10 is not this case; it's the other issues that Mr. -- or
11 her investigation in terms of, you know, what she's
12 responsible for primarily is that other stuff. This case
13 came along --

14 THE COURT: That "other stuff" being the other
15 issues with respect to Mr. --

16 MR. ROBBEN: Guionnet.

17 THE COURT: -- Guionnet? Okay.

18 MR. ROBBEN: This case came along shortly after.
19 This was in late August. This case came in late October.

20 THE COURT: Of 2014?

21 MR. ROBBEN: Correct.

22 THE COURT: So I guess what we really need is
23 Ms. Malimar (*verbatim*) to be available.

24 MR. ROBBEN: La Mar.

25 THE COURT: I'm sorry, La Mar. Thank you. And

1 can she be available?

2 MR. ROBBEN: We can check with her. She's in
3 Los Angeles, so I don't know what the time difference or
4 what her schedule is, but we could certainly inquire.

5 THE COURT: All right. I will ask you to do
6 that at the break. With respect to this memo, TCS, who
7 is it that prepared it?

8 MR. ROBBEN: The memo is from Mr. Menon; someone
9 named *Paul Almalraj*, who is one of Mr. Menon's direct
10 reports; and someone named *Dr. Santosh Mohanty*, who is
11 the person who is responsible for IP issues at TCS.

12 THE COURT: All right. And, Mr. Menon, why is
13 it that you prepared that report?

14 MR. MENON: We got a request from Ms. La Mar
15 stating that there were a list of allegations she was
16 looking into and --

17 (Reporter clarification.)

18 THE COURT: Yeah, if you could bring the mic
19 closer to you. You can also stand, if you want to --
20 there's a podium -- if you're comfortable. Whatever you
21 prefer.

22 MR. MENON: Okay.

23 THE COURT: Thank you. So she asked you -- she
24 presented you with a series of questions that had been
25 raised that she needed answers to; is that what you're

1 saying?

2 MR. MENON: Yes.

3 THE COURT: I don't want you to go into the
4 specifics of the questions. I want to be respectful of
5 the privilege. But you prepared this in response to the
6 questions that she posed; is that correct?

7 MR. MENON: She had a request that we do an
8 investigation on two of these pieces: one piece being
9 download of information, et cetera; the second one being
10 misuse of that information for Med Mantra. So they were
11 specific questions. She said that these are two
12 allegations which she cannot investigate because it's
13 more specific to the act that is happening at Chennai, so
14 she wanted TCS to do that. So she asked and we responded
15 with a report.

16 THE COURT: What did you gather in response to
17 the download of information?

18 MR. MENON: Initially when we spoke to the
19 team --

20 THE COURT: The *team* being?

21 MR. MENON: The team at the TCS Kaiser oversea
22 in Chennai. We spoke to them and what we gathered from
23 that is that Ramesh Gajaram had indeed shared his
24 credentials with a few of his colleagues.

25 THE COURT: And when you say "what we gathered

1 from that," you didn't personally gather this
2 information?

3 MR. MENON: I did.

4 THE COURT: You did. Okay. Thank you. And in
5 learning that information, then you reduced that to a
6 memo form for Ms. Malimar (*verbatim*)?

7 MR. MENON: Right. That's correct.

8 THE COURT: All right. Any other direction that
9 she gave you other than that she needed information?
10 Again, I don't want specifics, but anything more than you
11 needed information on what -- how it happened that there
12 was a downloading of information and how that information
13 was used?

14 MR. MENON: Right. Not any more than that.

15 THE COURT: It was just those two general
16 positions?

17 MR. MENON: Right. That's correct.

18 THE COURT: And your position is?

19 MR. MENON: I'm the chief security officer of
20 TCS.

21 THE COURT: Okay. And, Counsel, you withheld
22 that document; is that correct?

23 MR. ROBBEN: Correct, on privilege.

24 THE COURT: On the theory that it was prepared
25 at the direction of counsel and is work product as well

1 as attorney-client privilege?

2 MR. ROBBEN: That's correct.

3 THE COURT: Let me hear then from Epic. Thank
4 you, very much, for your comments. Let me hear from Epic
5 then. Have you taken, and I'm going to butcher this
6 name, but Mr. Muthuswami's deposition?

7 MR. RICHMOND: We have not, Your Honor. We only
8 very recently became aware that this investigative
9 activity was done by Mr. Menon and Mr. Almalraj and the
10 Doctor, so we -- I believe we have them noticed. We have
11 another trip to India scheduled tentatively in January
12 for a lot of depositions and I believe he is one.

13 THE COURT: All right. Mr. Menon, I apologize,
14 if you could rise again, but only for the benefit of the
15 court reporter. I don't mean to make you jump up and
16 down. But have you learned of a human resource
17 investigation or inquiry that began in the spring, early
18 summer of 2014?

19 MR. MENON: With regards to the allegations of
20 Epic information download, no.

21 THE COURT: Okay. To your knowledge, there was
22 no formal investigation done?

23 MR. MENON: Yes.

24 THE COURT: Who would know, besides you, if
25 there had been?

1 MR. MENON: I'm saying there was no such report.
2 I handle such investigations.

3 THE COURT: All right. So you would have known
4 about it had it been done?

5 MR. MENON: Yes, very much.

6 THE COURT: All right. Can I ask you the same
7 with respect to the Audit Committee investigation in the
8 spring or early summer of 2014: was there an Audit
9 Committee investigation?

10 MR. MENON: I may not completely know that, but
11 that's exactly what Michelle La Mar was doing on behalf
12 of the Audit Committee.

13 THE COURT: So your understanding is that she
14 was engaged by the Audit Committee to prepare or to do an
15 investigation?

16 MR. MENON: Right.

17 THE COURT: And do you know whether someone
18 within the Audit Committee, a CPA or someone with an
19 accounting background or other investigative experience,
20 participated in that investigation on behalf of Tata?

21 MR. MENON: I wouldn't know that. So I think it
22 started much before I got into this.

23 THE COURT: "It started" meaning?

24 MR. MENON: Ms. La Mar's engagement started
25 before I was informed about this issue. So as

1 Mr. Guionnet informed her about many of his allegations,
2 these two is what she handed off to us. My involvement
3 start then. I'm not privy to what happened prior in
4 terms of if there was a direct connect with --

5 THE COURT: The easier part about that is that
6 would have been true with respect to a human resource
7 investigation as well, but you're confident you know
8 about that?

9 MR. MENON: Yes.

10 THE COURT: And the reason is because?

11 MR. MENON: Any such investigation with regards
12 to misuse of information is my responsibility at TCS.

13 THE COURT: But the Audit Committee
14 investigation is not?

15 MR. MENON: The Audit Committee investigation
16 was primarily on a whole other set of allegations, so the
17 whole thing was taken to Ms. La Mar.

18 THE COURT: So the Audit Committee investigation
19 would have been concerned with other matters than the
20 access or downloading of Epic confidential information by
21 someone associated with Tata, or you just don't know?

22 THE DEFENDANT: I wouldn't know. I wouldn't
23 want to answer that.

24 THE COURT: That's all right. I'm with you.

25 MR. ROBBEN: Your Honor?

1 THE COURT: Hang on just a second.

2 MR. ROBBEN: Sure.

3 THE COURT: With respect to the Security
4 Department investigation, you would have been the
5 person -- you would be familiar with any investigation
6 conducted by that group, correct?

7 MR. MENON: Yes.

8 THE COURT: All right. And so you were involved
9 in any follow-up resulting from Kaiser's request. Did
10 Kaiser contact Tata and ask for a follow-up to determine
11 what had occurred with respect to accessing or
12 downloading information?

13 MR. MENON: Kaiser conducted their own
14 investigation.

15 THE COURT: Kaiser did?

16 MR. MENON: Yes.

17 THE COURT: All right. And that's now been
18 produced, that report has been produced, correct? You
19 wouldn't be familiar?

20 THE DEFENDANT: I don't know.

21 THE COURT: All right. I was under the
22 impression, but we'll come back to counsel for that.

23 MR. ROBBEN: I think there could be a
24 misunderstanding, I will say.

25 THE COURT: All right. You can clarify,

1 Counsel.

2 MR. ROBBEN: I think what Mr. Menon said is that
3 Kaiser did its own investigation of the UserWeb
4 allegations and that is true. TCS, at Michelle La Mar's
5 request, did a parallel investigation of its own. And
6 then the portion of that that related to UserWeb access
7 was provided to Kaiser by TCS in September of 2014.

8 THE COURT: All right. Let me hear from Epic's
9 counsel on that subject. And I'll let you sit down a
10 moment, Mr. Menon. No, I appreciate it. No, no, you're
11 welcome to stand, all right, rather than have you go up
12 and down. I'm just apologizing. I usually don't have a
13 witness stand while counsel are speaking.

14 Can you advise me as to your understanding with
15 respect to this so called *Kaiser investigation*?

16 MR. RICHMOND: Yes, Your Honor. Let me just put
17 it in context, if I may. What we know is in late April
18 Mr. Muthuswami wrote to Mr. Guionnet and said, "Human
19 resources will be conducting a prompt and thorough
20 investigation into your allegations. You will be
21 contacted at the conclusion of the investigation."

22 And then, as I said, Narsi, the head of human
23 resources, began to contact Mr. Guionnet. So there
24 clearly was a human resources investigation. Whether
25 Mr. Menon knows about it or not, there clearly was,

1 unless the TCS president was just making it up.

2 So where that is, where the papers are, I don't
3 know. But even if there was some piece of that that was
4 privileged, like a lawyer's comment that said, "Wow, we
5 are really in trouble; we broke the law; we violated a
6 contract"; maybe that part is privileged, maybe we would
7 talk about waiver here.

8 But beyond that, all the facts that were uncovered
9 in that human resources investigation, we're entitled to
10 know. We need to know that: who did they talk to, what
11 documents did they look at, et cetera.

12 THE COURT: I get it. Hang on a second.

13 MR. RICHMOND: Okay.

14 THE COURT: Mr. Menon, is it possible that there
15 could have been an investigation followed -- are you
16 familiar with what he's just described --

17 MR. MENON: Very much.

18 THE COURT: -- having occurred? Okay. So there
19 was some kind of examination made. Did that involve you
20 or did not involve you?

21 MR. MENON: There was no a char (*ph*)
22 investigation or there was no valid investigation by
23 anybody in TCS.

24 THE COURT: No valid?

25 MR. MENON: No valid investigation by any other

1 team in TCS into Epic and downloaded Epic.

2 THE COURT: So what was occurring within HR at
3 that time?

4 MR. MENON: So, as I said before, Philippe
5 Guionnet had a list of allegations. The whole thing was
6 taken to Michelle La Mar. She heard him out. And as she
7 conducted her own assessment on the entire list of
8 allegations, these two pieces were handed off to me.

9 MR. ROBBEN: Your Honor, could I make a point on
10 timing that I think might be helpful?

11 THE COURT: He said April of 2014. And your
12 point is what?

13 MR. ROBBEN: My point is that Mr. Guionnet
14 raised allegations in April and those allegations
15 concerned his own employment, homeland security, billing
16 fraud, et cetera.

17 THE COURT: Understood.

18 MR. ROBBEN: Later on he raised allegations as
19 to Epic and UserWeb and Med Mantra. And at that point
20 those allegations became part of an investigation that
21 was already ongoing. So the HR part --

22 THE COURT: I'm with you. Do you have any
23 information, Mr. Richmond, that indicates that this
24 initial investigation involved the possible unauthorized
25 access to Epic?

1 MR. RICHMOND: It absolutely should have, but I
2 don't have visibility into whether it did in fact. I
3 don't know that.

4 THE COURT: It certainly sounds plausible that
5 they would have had lots of things to investigate and
6 that this issue didn't come up until later, right?

7 MR. RICHMOND: Well, no, the issue did come up,
8 because Mr. Guionnet sent very clear emails.

9 THE COURT: Mr. Guionnet sent a lot of stuff.

10 MR. RICHMOND: Yes, he did.

11 THE COURT: So they had to prioritize as to what
12 they were going to investigate. It's plausible that they
13 didn't get on to Epic's concern -- that is, access to
14 Epic information -- until later.

15 MR. RICHMOND: I don't have the record citations
16 right in front of me, but I think that's not quite right
17 because they pestered, I'll use the word *pestered*, TCS
18 human resources people pestered Mr. Guionnet and said,
19 "You're not going quick enough. You need to give us more
20 detail. You need to be more clear. And if you don't" --

21 THE COURT: More clear about Epic?

22 MR. RICHMOND: I believe it does say about Epic.

23 THE COURT: Why do you say that?

24 MR. RICHMOND: Because of the nature of the back
25 and forth emails between Mr. Guionnet and Narsi, the head

1 of human resources. And Narsi was saying, "You're not
2 being clear enough, you need to be more clear, and you
3 need to give it to me within 48 hours." And that was
4 happening in the April-May time frame of 2014.

5 THE COURT: All right. And as you sit here
6 today, Mr. Robben, you can assure the Court that none of
7 that exchange or investigation by HR dealt with Epic's --
8 or access to Epic's confidential information?

9 MR. ROBBEN: That is my understanding, because
10 I'm looking for the exhibit because we put it in the
11 opposition to the motion, Mr. Guionnet's correspondence,
12 and Epic doesn't come up until later on.

13 THE COURT: And this is in your response?

14 MR. ROBBEN: I believe it's in the
15 declaration -- it's exhibits to the declaration and
16 that's what I was trying to prove.

17 THE COURT: Mr. Richmond, can you tell me where
18 it is that -- where and when the Epic issue began to be a
19 focus of Tata?

20 MR. RICHMOND: Yes. If you look at our brief,
21 on page 10, Your Honor, it's partly in the deposition
22 transcript of Mr. Guionnet, which we've cited. It's also
23 in Exhibit 12 to my --

24 THE COURT: I'm on page 10.

25 MR. RICHMOND: Yes.

1 THE COURT: And you say it's part of -- what are
2 you referring to?

3 MR. RICHMOND: If you look at the carryover
4 paragraph on top of the page, Your Honor.

5 THE COURT: I'm sorry. In your motion to
6 compel?

7 MR. RICHMOND: In the brief in support of our
8 motion to compel on page 10, yes.

9 THE COURT: All right. And I'm on page 10 of
10 that brief.

11 MR. RICHMOND: All right. Then --

12 THE COURT: There is no carryover paragraph on
13 page 10.

14 MR. RICHMOND: Oh, I'm sorry. My clip was
15 holding it down. It's a new paragraph that starts out
16 just after "receiving."

17 THE COURT: Now we're on the same page.

18 MR. RICHMOND: Okay. My clip covered up the
19 indentation. My apologies, Your Honor.

20 THE COURT: It's fine. I just want to make sure
21 we're --

22 MR. RICHMOND: Second line is where it really --
23 well, that whole paragraph really describes what I'm
24 talking about. So Mr. Guionnet received the top
25 performance rating for his -- the year ended March 31st,

1 2014. And he wrote to Mr. Sundar about the "Epic
2 situation," and you'll see the quote there. He accused
3 Mr. Sundar of having corrupted an individual in a foreign
4 country in order to obtain his access code to "render
5 your services fraudulently and knowingly and
6 deliberately. As if this was not enough, the Offshore
7 Team that has access to the Epic information we're not
8 supposed to access is the same team allegedly also linked
9 to Med Mantra, a competitor of Epic."

10 And that e-mail, I don't see the date exactly of
11 that e-mail here. But if we looked at the documents, we
12 could figure it out.

13 THE COURT: Could you do that while --

14 MR. RICHMOND: It's April 20th, 2014, Your
15 Honor.

16 THE COURT: All right. So we know that
17 Mr. Guionnet made these accusations. What do we know
18 about Tata's follow-up?

19 MR. RICHMOND: The follow-up took two forms,
20 Your Honor. One was some back-and-forth correspondence
21 by email between Mr. Guionnet and Narsi, the head of
22 human resources. The other one was that he was contacted
23 by a man named *Curt Bajak* from the Loeb law firm. And
24 you'll see in the record an exchange of emails between
25 Mr. Guionnet and Mr. Bajak.

1 And Mr. Guionnet, in his deposition, said that for
2 allegations of the type he was raising, it was his belief
3 that the Audit Committee would get involved. Now, why is
4 that? Audit committees are supposed to be independent.
5 You can't have the *fox guarding the hen house*.

6 So responsible large corporations, when they are
7 accused of wrongdoing, they don't necessarily rely on
8 their in-house staffs to figure out what went wrong. If
9 they really are serious about trying to figure something
10 out, the audit committee, in its role of protecting the
11 company in an auditing fashion, will conduct its own
12 independent investigation.

13 Mr. Guionnet was wise to those distinctions and the
14 kinds of investigations that companies do either by your
15 human resources department. But if that's the *fox*
16 *guarding the hen house* --

17 THE COURT: I think we're going far afield from
18 what I'm trying to ask you, which is what do you know
19 about --

20 MR. RICHMOND: Let me get right to it.

21 THE COURT: -- Tata's follow-up with respect to
22 this specific accusation.

23 MR. RICHMOND: Yes. Mr. Bajak contacted
24 Mr. Guionnet. Mr. Guionnet thought it was part of the
25 human resources investigation. But when he asked,

1 Mr. Bajak said "no."

2 THE COURT: And Mr. Bajak being from Loeb?

3 MR. RICHMOND: He's a Loeb partner in Los
4 Angeles.

5 THE COURT: I just wanted to confirm. Okay.

6 MR. RICHMOND: Yes. When he had his
7 back-and-forth with Mr. Bajak, he said that he was "under
8 the representation that you are acting as an outside
9 investigator and not a lawyer and that your report would
10 not be protected by attorney-client privilege."

11 Mr. Bajak wrote --

12 THE COURT: I'm sorry. Who said that?

13 MR. RICHMOND: Mr. Guionnet said that to
14 Mr. Bajak. Mr. Bajak said to Mr. Guionnet, "Can we meet
15 and talk?"

16 And before he would talk, Mr. Guionnet said, "I want
17 to understand exactly what your role is."

18 And so Mr. Guionnet, in trying to confirm his
19 understanding, this is the bottom of page 12 --

20 THE COURT: So clearly the communication between
21 Mr. Bajak and Mr. Guionnet was not privileged.

22 MR. RICHMOND: No.

23 THE COURT: But I don't know how in the world I
24 can rely on Mr. Guionnet's statement -- hearsay statement
25 by an attorney from Loeb & Loeb that what he is doing is

1 not privileged. I mean, come on.

2 MR. RICHMOND: No, no. Let me -- I'm just
3 trying to set the context, Your Honor, for what --

4 THE COURT: Well, you're doing a poor job if
5 that's what you're relying on. I'm trying to understand
6 what evidence you have. And I guess your response is, it
7 all depends on Mr. Guionnet's statement that Mr. Bajak
8 was doing this investigation with regard -- including the
9 issues with regard to Epic back in -- and when was this
10 conversation?

11 MR. RICHMOND: This is an email exchange. And
12 this happened -- you'll see at the bottom of page 12 of
13 our memorandum, that's what I was talking about, it's
14 Exhibit 17 to the declaration. And in response to that,
15 Mr. Bajak said, "I'm not acting as counsel either to TCS
16 or to you."

17 THE COURT: That's in an email?

18 MR. RICHMOND: Yes. These are emails.

19 THE COURT: "I'm not acting as counsel to" --

20 MR. RICHMOND: This is the top of page 13 of our
21 brief, Your Honor. Mr. Bajak, said in an email, "I am
22 not acting as counsel either to TCS or to you with
23 respect to this matter." And he said he was acting "on
24 behalf of the Audit Committee."

25 THE COURT: I don't understand how that answers

1 my question, which is what do we --

2 MR. RICHMOND: That's all I know, Your Honor;
3 that's the problem. I don't know much more than you do.

4 THE COURT: His statement is confirmatory that
5 he is engaged in an internal investigation.

6 MR. RICHMOND: I agree. I agree.

7 THE COURT: So I -- let's start --

8 MR. RICHMOND: So the point of this, Your Honor,
9 is if there was an investigation for the Audit Committee,
10 we're not saying that every single thing that was said to
11 the Audit Committee is discoverable. There may be
12 ultimate conclusions reached about the size of liability
13 for TCS that this presents or creates. There may be
14 other privileged kinds of conclusions.

15 But whatever Mr. Bajak collected, who did he talk
16 to? What documents did he get? What are the facts?
17 Those are not privileged. The facts are the facts,
18 whatever they are. And TCS has gathered them up I
19 believe in two or three or four different kinds of
20 investigations and we should have access to those facts.

21 THE COURT: Okay. And Mr. -- Tata, with respect
22 to -- I'm sorry -- with respect to the investigation that
23 was being conducted, to the extent that counsel was
24 gathering information, that's not privileged unless it
25 was -- well, it's not going to be subject to work product

1 privilege; it was in anticipation of litigation between
2 Mr. Guionnet and Tata, correct?

3 MR. ROBBEN: Well, yes, but I think an important
4 point is that the correspondence that Mr. Richmond
5 referred to was fairly early on, but it's kind of like a
6 little crumb. And when Mr. Bajak went out to
7 Mr. Guionnet, he -- and we talk about this on page 8 of
8 our opposition, he wrote to him in early May and said,
9 "I'd like to talk to you; I'd like to talk to you," and
10 he didn't get a response.

11 And then later on in June, that's when Mr. Guionnet
12 starts to sort of flesh out what he's alleging as to
13 UserWeb and Med Mantra, and so the investigation now
14 starts to include those details.

15 I mean, for him to say in April all this illegal
16 activity, and he does a laundry list and he throws in a
17 reference to Epic, isn't the same as saying, "This is the
18 illegal activity I'm claiming." So the investigation
19 didn't turn to that until later. The investigation prior
20 to that, whatever Mr. Bajak was doing, was about things
21 that aren't at issue in this case.

22 THE COURT: And again, I'll come back, since
23 that is where I started, any information you have to
24 suggest that that's not true?

25 MR. RICHMOND: I just don't have the information

1 one way or the other, Your Honor.

2 THE COURT: Because you don't have any
3 information from Loeb & Loeb?

4 MR. RICHMOND: Correct. And I have not yet
5 taken the deposition of Mr. Menon or Mr. Almalraj or
6 Dr. Mohanty.

7 THE COURT: All right. And while we continue
8 this discussion, could someone step out and see if both
9 Mrs. Malimar and Bajak are available? Thank you. And if
10 you do, you could get a number at which they could be
11 reached. Thank you, very much. All right.

12 Tell me what you have received with respect to the
13 Kaiser investigation.

14 MR. RICHMOND: Yes, Your Honor. Kaiser --

15 THE COURT: I'm sorry. You can sit down,
16 Mr. Menon. Thank you, very much.

17 MR. RICHMOND: Kaiser received notice from the
18 whistleblower just shortly before Epic did. Kaiser began
19 to conduct its own investigation, as we understand it, in
20 the summer of 2014.

21 THE COURT: And have you sought discovery from
22 Kaiser?

23 MR. RICHMOND: We have. We have not gotten that
24 report. We've gotten from Kaiser, information from
25 computers and from emails.

1 THE COURT: And what did Kaiser -- and have you
2 asked for the report?

3 MR. RICHMOND: We have talked about it. They
4 are resisting it thus far on privilege grounds,
5 privilege.

6 THE COURT: Okay. They were doing their own
7 internal investigation?

8 MR. RICHMOND: Yes, Your Honor.

9 THE COURT: And they're claiming the same
10 privilege as Tata is claiming?

11 MR. RICHMOND: Well, yes -- yes and no.

12 THE COURT: By name.

13 MR. RICHMOND: By name, yes.

14 THE COURT: Work product and attorney client?

15 MR. RICHMOND: Yes, by name, yes.

16 THE COURT: All right. So you don't have their
17 actual report?

18 MR. RICHMOND: I don't. But what I do have is
19 the report that TCS gave to Kaiser. So Kaiser, when it
20 was doing its investigation, reached out to TCS and said,
21 "We want your help with this investigation to figure out
22 what happened." TCS did an investigation. I believe
23 that's what I'd call the *security department*
24 *investigation*.

25 THE COURT: But you have that?

1 MR. RICHMOND: We have a report dated September
2 14th, 2014, which was sent to Kaiser shortly after its
3 preparation. So let me just -- we're not quite to that
4 part of the discussion, but in terms of even if things
5 are privileged, have they been waived or not, if there
6 truly is only one investigation and somehow I'm wrong
7 about this and there was only one grand investigation;
8 well, the report about that investigation was always
9 being prepared to give to a third party, Kaiser, with no
10 protection at all with any kind of privilege. And it
11 contains not only some facts, but it contains ultimate
12 conclusions.

13 THE COURT: Mr. Robben.

14 MR. ROBBEN: The report was not being prepared
15 for Kaiser; it was being prepared -- the internal
16 investigation TCS was doing was for itself. Kaiser did
17 ask along the line, "Can we have your conclusion?" And
18 the portion of that that related to UserWeb access or a
19 write-up on that was given to Kaiser.

20 But the investigation that TCS did was broader
21 because it contained not only the access part, the
22 UserWeb part, but did that UserWeb information make its
23 way to Med Mantra. And that part Kaiser was not
24 interested in and we did not give them.

25 THE COURT: Okay. But you'll agree that there

1 was at least a partial waiver of the attorney-client
2 privilege when you disclosed to Kaiser the access
3 information?

4 MR. ROBBEN: No, I wouldn't agree that there's a
5 partial waiver --

6 THE COURT: Why not?

7 MR. ROBBEN: -- as to that document.

8 THE COURT: Why wouldn't that constitute a
9 waiver? You just disclosed exactly what you're asserting
10 is privileged here to a third party.

11 MR. ROBBEN: Well, it's not disclosing the --
12 it's not waiving the privilege as to the entire
13 investigation.

14 THE COURT: I didn't say it was a waiver of the
15 entire investigation; I said it's a waiver of the
16 privilege with respect to information about access to
17 Epic through Kaiser. How is it not?

18 MR. ROBBEN: Because it's just a summary of --

19 THE COURT: Of the privileged information that
20 was obtained. You've waived that. That much is decided
21 today. You've waived any information that was gathered
22 by the Loeb firm or in any other subsidiary investigation
23 or separate investigation by Tata with respect to
24 accessing information. That privilege is gone. And all
25 information needs to be produced within the next 14 days.

1 Now, you may not have waived the broader privilege,
2 but I don't understand how you could take a position that
3 if you disclosed a clear subject matter to a third party
4 that you get to continue to assert that privilege against
5 Epic in this case. That's not defensible. So that will
6 be done. Are we clear?

7 MR. ROBBEN: We're clear.

8 THE COURT: All right. Now, as to the report
9 provided Kaiser, has that now been produced?

10 MR. ROBBEN: Yes.

11 THE COURT: And within that report, the only
12 thing you produced was information regarding access?

13 MR. ROBBEN: Correct.

14 THE COURT: So it was a portion of the larger
15 report prepared by Loeb, correct?

16 MR. ROBBEN: It was a -- it's a -- it's not a
17 portion of something prepared by Loeb; it's a --

18 THE COURT: I want to know what was it that was
19 produced. Did Loeb prepare it?

20 MR. ROBBEN: They did not.

21 THE COURT: How was it prepared?

22 MR. ROBBEN: It was prepared -- the memo that
23 was prepared for Ms. La Mar was --

24 THE COURT: I'm sorry. That was prepared by
25 Ms. La Mar?

1 MR. ROBBEN: For her.

2 THE COURT: For her. In other words --

3 MR. ROBBEN: Factual memo.

4 THE COURT: -- the May memo to her that was
5 provided based on the two questions that she posed?

6 MR. ROBBEN: August, yes.

7 THE COURT: All right.

8 MR. ROBBEN: August. She requests that TCS look
9 into this matter and give her facts. TCS does that
10 between late July and August. On August 22nd they send
11 her a memo. The memo concerns matters that cover her
12 questions.

13 THE COURT: Well, I think we're at the point
14 where you can certainly disclose the subject matter, the
15 headings, which is it included what information was
16 accessed through Kaiser by Tata employees, right?

17 MR. ROBBEN: It didn't include what information;
18 it included who might have done it.

19 THE COURT: Okay.

20 MR. ROBBEN: And from that memo that was created
21 for her, a separate document was adapted and that's what
22 was provided to Kaiser.

23 THE COURT: Who adapted that memo?

24 MR. ROBBEN: I believe it was Mr. Menon and his
25 team.

1 THE COURT: All right. So he did a second memo
2 to Kaiser using information that he had created at the
3 time he provided a report to Ms. Malimar?

4 MR. ROBBEN: But only as to the UserWeb access
5 piece, not as to the Med Mantra piece.

6 THE COURT: No, no. You're quite clear. The
7 problem I'm having is I'm really uncomfortable when you
8 then turn around and provide half of the Malimar memo
9 regarding the accessing of information to a third party,
10 Kaiser, that the remainder of the memo stays privileged
11 under a general rubric of attorney-client work product,
12 particularly when we've now been dancing for almost a
13 year -- the clients have been dancing for almost a year
14 repeatedly going to the magistrate to get exactly the
15 information that's being sought in that memo.

16 And at best, your client has done a poor job of
17 providing the right people at the right time with
18 information at depositions, particularly the 30(b)(6)
19 depositions, that we should be dancing any more and I
20 shouldn't just order that the Menon report be produced.
21 It's simply a factual report, isn't it? It's answering
22 very general questions as to what are the facts.

23 MR. ROBBEN: It discusses the facts, but it
24 discusses interviews and what people said at interviews
25 and has that type of content as well.

1 THE COURT: All right. At the break I will ask
2 that you provide me -- you have a copy of that today?

3 MR. ROBBEN: We should have a copy of it or can
4 obtain one.

5 THE COURT: All right. I would ask that you
6 provide it under seal. If you need to print out a
7 version, we have an attorney's work room where you can
8 have it sent to you and you can use the printer there to
9 point it out. I would like to see a copy of the entire
10 memo.

11 In any event, and in addition, I would ask Epic to
12 provide me with the memo which was or the report which
13 was finally produced to you. I take it, it was -- you're
14 calling them *TCS* and you refer to them as *Tata*. Is there
15 a legal distinction between the two entities?

16 MR. RICHMOND: Your Honor, I hope that never
17 becomes a question in this case, but I have wondered.

18 THE COURT: Well, let's leave you out of it.
19 When you say *Tata*, do you intend something different than
20 *TCS*?

21 MR. ROBBEN: No. I mean, well, there is a *Tata*
22 Group, but I'm referring to the defendants in this case.

23 THE COURT: The *TCS* defendant?

24 MR. ROBBEN: Correct.

25 THE COURT: All right. We're on the same page.

1 But then I think it's probably better to use *TCS* for
2 purposes of our discussion.

3 MR. ROBBEN: Sorry about that.

4 THE COURT: No, no. No one needs to apologize
5 to me. I'm just trying to assist the parties in getting
6 to the bottom of this so we can complete this case.

7 With respect to *TCS*, you've now been provided, I
8 take it, with a report as to downloaded information.

9 MR. RICHMOND: What we received, Your Honor --

10 THE COURT: I should say, as to who may have
11 accessed that information.

12 MR. RICHMOND: We did receive the report that
13 *TCS* gave to Kaiser. We received it in an unusual way
14 only very recently.

15 THE COURT: I know that it came only in the fall
16 of this year and as a result of repeated requests for
17 information.

18 MR. RICHMOND: Yes. And the only way we got it,
19 Your Honor, was you had asked earlier, have we asked
20 Kaiser for information. The answer is "yes." A man
21 named *Anmol Gupta's* laptop, which had been issued by
22 Kaiser to help him do his work, was produced to us. And
23 on that laptop of *Anmol Gupta*, there was a document that
24 was somewhat similar to the report eventually given to
25 Kaiser. It was a PowerPoint. We had noticed that and

1 put a Bates number on it.

2 THE COURT: I understand.

3 MR. RICHMOND: Okay.

4 THE COURT: Do you know when that -- when was
5 the report prepared that was provided to Kaiser?

6 MR. ROBBEN: I believe the date is September
7 12th, 2014.

8 THE COURT: All right. How was that not
9 produced until a year after?

10 MR. ROBBEN: When we had that report, we thought
11 it was a privileged document. And it wasn't until --

12 THE COURT: And so you thought that it was only
13 internal to TCS, that it had never been provided to
14 Kaiser?

15 MR. ROBBEN: Correct. And the document --

16 THE COURT: Mr. Menon knew at the time he
17 prepared it who it went to, correct?

18 MR. ROBBEN: Yes.

19 THE COURT: So did anyone ask him?

20 MR. ROBBEN: No. Because of the context in
21 which we got it, it suggested that it was confidential,
22 it was privileged. And so it wasn't until we realized --

23 THE COURT: Who was it addressed to?

24 MR. ROBBEN: It was addressed to somebody named
25 *David McLeod* at Kaiser. But all of the people on the

1 email were --

2 THE COURT: It was addressed to a *David McLeod*.
3 Did it say *Kaiser*?

4 MR. ROBBEN: Well, we didn't have the email
5 because we were searching email. We had agreed on
6 certain custodians of email and none of those custodians
7 of email were involved with this document. And so it
8 wasn't until later when we saw the email --

9 THE COURT: I guess what this really highlights
10 is you're not creating confidence and you certainly did
11 not -- you shuck any confidence by the magistrate judge
12 as to the quality of the investigation that you did in
13 terms of responsive documents. You've produced 30(b)(6)
14 witnesses who were not adequately prepared to answer
15 questions and those had to be done again. And you're
16 building a record -- you've built a record over the last
17 year of not doing an adequate job in production of
18 relevant information to this lawsuit.

19 And so if it's a close question, I'm inclined -- and
20 I'm strongly inclined, although I will look over the
21 document -- to simply require the disclosure of the
22 entire Menon report to the Loeb law firm, which, from
23 what it sounds like, is pretty much just a factual
24 summary. It is information that would be very difficult
25 for Epic to gather on its own, as demonstrated by the

1 last year of its attempt to reconstruct the same
2 information. And I'm having trouble viewing that as a
3 more than -- viewing that as anything other than an
4 appropriate sanction, if nothing else, for what's
5 occurred to date.

6 MR. ROBBEN: May I respond to that?

7 THE COURT: Of course.

8 MR. ROBBEN: I think that we've done a proper
9 job of responding to discovery.

10 THE COURT: Well, I disagree. I mean, you can't
11 read the transcripts before Magistrate Judge Crocker or
12 his subsequent orders indicating that you had to redo
13 discovery repeatedly and come to that conclusion.

14 MR. ROBBEN: Well, on the, you know, *who*
15 *accessed the information* piece of this, there are certain
16 facts that I think are important.

17 THE COURT: I'm much more concerned over who
18 used the information, which is where the real disputes
19 are.

20 MR. ROBBEN: Well, that I think we have given
21 them full access to inspect the product that they say we
22 improved, the Med Mantra product. They have deposed the
23 person who --

24 THE COURT: We'll come to that in a moment.

25 MR. ROBBEN: Well, they've deposed the person

1 who ran the program. We told them that we did a scan of
2 all the computers that those Med Mantra people used and
3 didn't find any documents of theirs.

4 We have an expert report that says all of this
5 information that was downloaded, whether proper or not,
6 was the type of information tester people would need. So
7 it's not like this information was something that we had
8 absolutely no need for. And we've given the names of the
9 people who we could get to concede that they looked at
10 it. Now, that's changed over time. Some more --

11 THE COURT: That's my problem, it's changed over
12 time.

13 MR. ROBBEN: But that -- sorry.

14 THE COURT: And at the end of the day, you know,
15 without concluding that it was in any way deliberate or
16 even haphazardly done, the fact is we're a year into the
17 discovery process and we're only now getting the
18 information that should have come out earlier. So there
19 has to be some remedy for that. And it seems to me this
20 might be the most appropriate remedy I could fashion.

21 MR. ROBBEN: We've never taken issue with the
22 fact that there was downloading or password sharing.
23 It's never been an issue.

24 THE COURT: But they want to know who and how it
25 was used and that's never been an issue either. I mean,

1 from the beginning of the lawsuit it's been clear what
2 their complaint is. Whether or not you believe it has
3 merit, it caused damage or anything else, they were
4 entitled to that discovery. So we're just sort of
5 spinning wheels to have a further discussion about that.
6 That's what the lawsuit was about.

7 And whether you thought it had merit or not, you had
8 an obligation to provide timely discovery in response or
9 to seek a remedy from the Court. You didn't do that, so
10 there has to be a consequence for not having acted
11 diligently. But again, I want to review that report
12 before I decide.

13 MR. RICHMOND: Your Honor, may I add one thing
14 about this Kaiser report?

15 THE COURT: Very briefly.

16 MR. RICHMOND: The Kaiser report was delivered
17 to Mr. David McLeod via an email. He's clearly a Kaiser
18 guy.

19 THE COURT: We've just gone over that, yes.

20 MR. RICHMOND: But the people who delivered it
21 were these two men sitting here and Mr. Almalraj, so they
22 knew --

23 THE COURT: They've been very upfront. I've
24 only heard from Mr. Menon, but he hasn't fit any of
25 that --

1 MR. RICHMOND: The only point --

2 THE COURT: -- so there's no need to point to
3 him like he's a defendant in a criminal case.

4 MR. RICHMOND: No, no.

5 THE COURT: In any event, your point is what?

6 MR. RICHMOND: My point is that to the extent
7 that counsel thought it was privileged and had never gone
8 outside of TCS, when the in-house lawyer and the top
9 person for security in that company knew otherwise and
10 somehow no one asked them for a whole year --

11 THE COURT: I think I just said that.

12 MR. RICHMOND: Okay.

13 THE COURT: I don't know why we're spending any
14 more time on it.

15 MR. RICHMOND: Thank you, Your Honor.

16 THE COURT: Thank you very much though for
17 repeating my point. In any event, we can go on to the
18 next issue, which is, as I understand it, a desire, and
19 I'm not sure if this is how this would be fashioned and
20 what exactly it would get at, but a desire to prepare a
21 properly prepared 30(b)(6) witness to talk in detail
22 about -- and here, without artificial limitations, about
23 TCS's investigations and their findings and conclusions
24 to date.

25 It seems to me that the appropriate person to do

1 that is Mr. Menon. Is there some one else that you think
2 you would need to speak to? We've established the
3 30(b)(6) depositions have not been particularly helpful
4 in this case to date, so I'm hesitant to order some
5 general witness to be produced.

6 I mean, the problem with 30(b)(6) is counsel is
7 entitled to choose various people with information and to
8 advise them of additional information so that they can
9 speak for the company. The advantage of 30(b)(6) is you
10 now have the company speaking. But I don't see that as a
11 remedy for you here or at least one that is going to be
12 meaningful.

13 You have Mr. Menon scheduled for deposition. At
14 this point, anyway, you're probably going to have his
15 memo and you can use that memo to explore as you wish.
16 But if one thing has been demonstrated, a lengthy -- a
17 long list of topics in a 30(b)(6) deposition is not going
18 to get you anywhere. Is there someone else that you
19 think should be produced for that purpose?

20 MR. RICHMOND: Yes, Mr. Almalraj.

21 THE COURT: And you have him noticed for
22 deposition?

23 MR. RICHMOND: I believe we do, but let me just
24 look over my shoulder.

25 THE COURT: You don't need to do it this

1 second --

2 MR. RICHMOND: Okay.

3 THE COURT: -- because we're not going to
4 obviously resolve this before we take our morning break.

5 MR. RICHMOND: Dr. Mohanty.

6 THE COURT: All right. Why don't you decide if
7 there's some further relief -- I don't know what it would
8 be -- with respect to that part of your request.

9 MR. RICHMOND: Yes, Your Honor.

10 THE COURT: As to the third category, you're
11 asking for the presentment of deposition of Pushpa Hedge,
12 who was originally designated the general manager, but
13 apparently is also in-house counsel --

14 MR. ROBBEN: Your Honor?

15 THE COURT: Hang on a second.

16 MR. ROBBEN: All right.

17 THE COURT: -- to respond to specific
18 interrogatories identified -- which originally identified
19 only four TCS employees who had access and apparently
20 there now are a number of others. Is that a request
21 that's still necessary to be addressed today?

22 MR. RICHMOND: I believe we should be able to
23 ask her what she did to investigate the basis for her
24 interrogatory answer that there were four people who
25 accessed our Epic's UserWeb when the count today stands

1 at 27 people and it could be scores or hundreds.

2 THE COURT: All right. Mr. Robben.

3 MR. ROBBEN: Ms. Hedge is not a lawyer. She's a
4 general manager at the TCS --

5 THE COURT: Have you refused to produce her for
6 deposition?

7 MR. ROBBEN: Well, what we -- I think *refuse* is
8 a stronger word. What we said is --

9 THE COURT: What would you describe -- how would
10 you describe -- what word would you use?

11 MR. ROBBEN: What we said is that we would be
12 happy to designate Mr. Menon to talk about how those
13 interrogatory responses --

14 THE COURT: But why wouldn't you produce -- I
15 mean, she signed them. You can't -- it's obvious, if you
16 have someone sign the interrogatory response, you've
17 opened them up to deposition. So I don't understand,
18 however you phrase it, whatever else you've offered, why
19 wouldn't they be entitled to take her deposition.

20 MR. ROBBEN: I mean, she has no substantive
21 knowledge of the underlying facts, whereas the people
22 we'd be willing to put up about the preparation of those
23 responses do.

24 THE COURT: I understand that and I think that's
25 a fair point; that you offered those who had the

1 underlying information. And as to that, I don't want to
2 waste her time, but you're going to be there anyway.
3 Your only purpose is to discover what she did to confirm
4 the accuracy of the interrogatories she signed. And her
5 answer may well be "I listened to counsel and they told
6 me that's what happened."

7 MR. RICHMOND: It could be a very short
8 deposition, Your Honor.

9 THE COURT: All right. They're entitled to find
10 that out and so you'll produce her for deposition.

11 MR. ROBBEN: Your Honor, could we produce her by
12 phone or by video?

13 THE COURT: Where is she?

14 MR. ROBBEN: She's in New York. But if it's
15 such a -- if it's going to be such a short deposition, it
16 just might be --

17 THE COURT: And that's what you're representing,
18 that she has no -- she did no independent investigation?

19 MR. ROBBEN: She -- other than talking to
20 counsel or interacting with counsel.

21 THE COURT: That's what I meant. So she did no
22 independent investigation; she simply relied on counsel
23 and then she was chosen to sign the interrogatory
24 responses?

25 MR. ROBBEN: Correct. And the company is not

1 backing away from the response.

2 THE COURT: I know that. I assume, and I
3 apologize because I didn't look at the specific signature
4 page, but it's probably the signature is preceded by a
5 paragraph saying, "I may not know any of this by personal
6 information" or "much of this may not be by personal
7 information," et cetera.

8 MR. ROBBEN: I don't remember the exact
9 language, but it is a boiler plate --

10 THE COURT: Pro forma, boiler plate. All right.

11 MR. RICHMOND: But, Your Honor, here's what she
12 said: she said that her answers are being verified based
13 on "review of pertinent files and discussions with
14 appropriate personnel." So that's what I'm going to ask
15 her: "What were the files you looked at and who were the
16 people you talked to?"

17 THE COURT: When is the next time that you're
18 going to be in New York?

19 MR. RICHMOND: There are so many depositions
20 happening so quickly, I believe it's next week, but I'm
21 not sure.

22 THE COURT: You can produce her live in New
23 York --

24 MR. ROBBEN: All right.

25 THE COURT: -- and you will at a time convenient

1 to the plaintiff's counsel. And you may be wasting your
2 time --

3 MR. RICHMOND: I understand it may be a short
4 deposition.

5 THE COURT: -- but I will not preclude you from
6 having that deposition.

7 MR. RICHMOND: We understand.

8 THE COURT: Okay. I believe then that resolves
9 the -- except for this open issue with respect to the
10 other investigation, that addresses the principal issues
11 with respect to Epic's first motion, but I'll hear from
12 Epic if there was something more that needs to be
13 addressed.

14 MR. RICHMOND: In this one respect, Your Honor:
15 It may be that you wish to have this discussion later
16 today, but part of the opposition to that particular
17 motion was TCS's description of Epic's focus on the three
18 liability questions as being just a mere distraction.

19 THE COURT: Yeah. I'm more -- I'm much more
20 interested in what relief you're seeking. That's a
21 relief you sought. I think I've addressed all of it
22 except for the open issue as to what more you may be
23 entitled to with respect to the investigation.

24 MR. RICHMOND: On this particular motion there's
25 nothing more to be done. But I think there is some

1 further discussion warranted at some point on --

2 THE COURT: I will give both sides an
3 opportunity to raise the larger issues, including the
4 astounding letter that was sent at the end of the day
5 yesterday, which I've already -- which was treated as a
6 motion by the clerk's office and so I've already denied
7 it. We'll take up those larger issues. But I am certain
8 that we will not have a productive resolution of the
9 motions before the Court if we stray into that at this
10 point.

11 MR. RICHMOND: Then Epic has nothing further on
12 the motion to compel with respect to the investigations,
13 Your Honor.

14 THE COURT: All right. And I assume that TCS or
15 Tata does not either?

16 MR. ROBBEN: That's correct.

17 THE COURT: Very good. All right. As to the
18 second motion before the Court, it is one seeking to
19 produce all outside counsel's -- and from that I believe
20 we're talking about Loeb & Loeb; we're not talking about
21 the Kelley firm?

22 MR. RICHMOND: Actually, we are, Your Honor.

23 THE COURT: Well, I'm not talking about the
24 Kelley firm unless you advance some better argument than
25 I've read so far. But I certainly agree we're talking

1 about the Loeb & Loeb firm and I will delay that until
2 after the break. Do we have any indication whether
3 either were available?

4 MS. MCGREGOR: Yes. I'm sorry. Mr. Verghese
5 called Ms. La Mar. Her cell phone was off. I think it's
6 two hours early in Los Angeles. He sent an email to her
7 and we'll check with her when we take a break.

8 THE COURT: All right. Very good. I will
9 postpone the discussion as to the information as to
10 outside counsel's investigation.

11 I am having trouble understanding -- I grant you
12 that what TCS did in choosing a 30(b)(6) representative
13 who had no involvement in these matters, was not involved
14 in the investigation of these matters and was going to
15 simply be testifying from what an attorney told them, is
16 poor form and perhaps even approaches obstruction.

17 I'm not sure what relief I can give you, for the
18 reasons I've already said, other than sanctions. And
19 I'll certainly hear from counsel for TCS before I
20 consider sanctions.

21 But in terms of requiring a further production of
22 30(b)(6), as I've already said, I think that's been
23 demonstrated to be a pyrrhic victory for Epic and I don't
24 really intend to continue to go through it. But I will,
25 as I've already indicated you can consider at break,

1 agree to your taking more depositions than I probably
2 would have but for this conduct. And if there is
3 specific individuals who you believe have information
4 that you're entitled, I will support your ability to take
5 them, unless it becomes punitive.

6 I'm not going -- given that you're travelling to the
7 various locations, I'm not going to give any direction as
8 to where those specific depositions take place other than
9 to say that there should be full cooperation from TCS in
10 terms of accommodating schedule and location when you're
11 there.

12 And I will I guess then just take up the question of
13 why this isn't evidence of a continued failure by TCS and
14 its counsel to make available people who actually know
15 something about this case when producing 30(b)(6)
16 representatives.

17 MR. ROBBEN: Your Honor, if it's acceptable to
18 you, Ms. MacGregor, will handle that response.

19 THE COURT: Absolutely.

20 MS. MCGREGOR: Your Honor, we had given Mr. --
21 primarily Mr. Richmond's motion focuses on the fact that
22 we provided Mr. Muthuswami, who's a high-level executive
23 of TCS.

24 THE COURT: I have no problem with your
25 providing any 30(b)(6) witness with a summary of

1 information that has been gathered by counsel that he can
2 speak to.

3 MS. MCGREGOR: Okay.

4 THE COURT: I have no problem with that,
5 particularly because you produced it and it was available
6 during the deposition. That's my understanding, correct?

7 MS. MCGREGOR: That's correct. We provided --

8 THE COURT: So I'm not concerned about that.
9 What I'm concerned about is the decision to produce
10 someone who had no involvement in the subject matter that
11 he is being asked about. And I really do think that if
12 nothing else, it's a cynical approach to a 30(b)(6)
13 notice.

14 MS. MCGREGOR: Certainly, Your Honor. I just
15 want to point out that in terms of working with Epic's
16 counsel, we have agreed that there are three notices at
17 issue. So one of them is security topics. We've agreed
18 that Mr. Menon will be that witness.

19 THE COURT: But he should have been to begin
20 with. He should have been your witness. His deportment
21 today demonstrates he's forthcoming, he's clear, he
22 didn't have to be prepped, he would have been able to
23 answer the questions, and you chose not to have him there
24 for the 30(b)(6). Instead, you chose someone with no
25 information because it was easier and frankly safer

1 because you, counsel, can control what information is
2 disclosed, since the only information the person has is
3 what you give them.

4 MS. MCGREGOR: Mr. Muthuswami did testify that
5 he had general knowledge of the security practices on at
6 least two different occasions during the deposition.

7 THE COURT: But he almost totally relied on the
8 information that was provided him during the course of
9 the deposition.

10 MS. MCGREGOR: He also, when he was asked about
11 what was done to create I think the list of UserWeb
12 individuals -- which we have agreed to produce these
13 people for depositions, we've agreed to produce the
14 communications with them by TCS -- all this information
15 has been offered to Epic and will be produced.

16 THE COURT: But you could have found someone --
17 one of those people, for example -- who was directly
18 involved in the accessing of information or disseminating
19 of the information to be your 30(b)(6) representative
20 rather than choosing carefully and frankly to delay the
21 inevitable. And had you done that, you wouldn't be
22 facing sanctions today.

23 MS. MCGREGOR: We disagree that it was to delay,
24 Your Honor. You know, we were very frank. We put
25 somebody who was a high-level executive. He did testify

1 that he's been working with the legal team getting
2 details that the legal team wants for some time. You
3 know, he's a high-level person. He's someone who's in
4 contact with in-house counsel. He was aware of what TCS
5 took very seriously the magistrate's direction that we
6 look further and he was aware of that. I actually asked
7 him at the deposition the direct question: "What was done
8 to generate this list?" And he testified that TCS did a
9 reach-out. I think, you know, some of the --

10 THE COURT: That TCS did a reach-out is
11 different than he did a reach-out. I did not see
12 anything, and I apologize to the extent I missed
13 statements about his direct participation, but I didn't
14 see references to his direct participation in gathering
15 information. On the contrary, the strong impression from
16 most of his responses was that he didn't engage in any
17 direct investigation.

18 He may well have been involved at the very top in
19 terms of discussing with counsel what happened. But they
20 weren't looking for a 30(b)(6) representative who had
21 discussions with counsel or was ultimately responsible
22 for the process; they were looking for someone who could
23 speak as to the subject matter.

24 And I agree, I don't know that what you did -- I
25 don't think it violates a specific rule. I'm just

1 concerned that it was a pointless exercise and one that
2 could have been avoided had you produced people who had
3 some real information on these topics, which is really
4 what a 30(b)(6) deposition is for: you designate someone
5 who's generally familiar with the topic. And you may
6 designate five people and they may have to take that
7 deposition and complete it over time, but you don't
8 designate someone who has no real direct information.

9 So if there's something specific you want to point
10 me to in his deposition that concerns his own involvement
11 and his own efforts at investigation, that would be
12 helpful.

13 MS. MCGREGOR: I mean, I can point you to a
14 general statement, Your Honor, where he did say on page
15 14 that he was directly involved in getting details that
16 the legal team wants. But I don't think that, I don't
17 want to waste your time, I don't think that's the type of
18 statement that you were looking for. But I do want to
19 make one point, with your indulgence, that many of these
20 topics --

21 THE COURT: I know I'm coming on strong and I
22 don't -- I don't want to overstate my concern. I don't
23 doubt that both TCS and its counsel were making efforts
24 to comply with the letter of the law. I'm just not sure
25 that in this instance you complied with the spirit of it.

1 And you're not the first client or firm that -- and
2 perhaps motivated by the fact that you think there's
3 nothing to this case and that how many people's lives are
4 you going to interrupt while you proceed.

5 Whatever the motivations, I'm just concerned that --
6 the other thing is, that this wasn't the first time that
7 you produced a 30(b)(6) individual who the magistrate
8 concluded wasn't knowledgeable and shouldn't have been
9 produced and required you to produce someone else. So
10 this is the second time that we've got this same
11 assertion.

12 MS. MCGREGOR: If I just may say, as to the
13 topics themselves, you know, I think we pointed this out
14 in our brief and I don't want to repeat that, but some of
15 them are asking very specific to name the titles, names
16 and positions of something like 14 individuals; the
17 titles, names, positions and responsibilities of --

18 THE COURT: I agree there are any number of
19 matters where it would have been appropriate to refer to
20 specific information. I just don't understand why you
21 wouldn't have chosen individuals who are more directly
22 involved. And you put your finger on one of those
23 obvious people, which is Mr. Menon.

24 A human resource person might have been someone,
25 particularly if there was a human resource person who was

1 actually doing some of the initial investigation. And
2 I'm not sure how or why that was done, but it sounds like
3 at some point Loeb & Loeb involved someone from human
4 resources in their overall investigation on these subject
5 matters. Why wouldn't you have produced them as one of
6 the 30(b)(6) representatives?

7 MS. MCGREGOR: Your Honor, I mean, I think that
8 our final point is that we did prepare the witness, he
9 did have knowledge. I went through and made a list of
10 the specific things he talked about.

11 He talked about he's familiar with the Kaiser
12 complaint assessment. He's one of the people that
13 received some of the emails from Philip Guionnet,
14 Mr. Muthuswami was; as was Mr. Sundar, who was the direct
15 boss of Mr. Guionnet.

16 He talked about who was responsible for making sure
17 which employees agreed to the 2005 contract, which
18 Mr. Richmond said was related to keeping information
19 secure.

20 He talked about who takes care of protecting
21 confidential information, including Epic information.
22 That was the account team.

23 He talked about policies and specific efforts by TCS
24 that are not covered in the security document to make
25 sure that passwords are not shared. And I think our

1 first witness said, you know, very forthcomingly, that,
2 you know, this was against the policy, the password
3 sharing; when we became aware that the password had been
4 shared and how; the company's position that the
5 comparative analysis --

6 THE COURT: When you say he talked about it --

7 MS. MCGREGOR: He testified about it. I'm
8 sorry.

9 THE COURT: He provided information as set forth
10 in the summary documents.

11 MS. MCGREGOR: I mean, he did say that he had
12 information about the security general knowledge.

13 THE COURT: But, I mean, he didn't testify from
14 his own knowledge; he just referred to the materials that
15 were prepared, at least for the most part, in his
16 deposition.

17 MS. MCGREGOR: The information that I was
18 reading to you is not from the December documents.

19 THE COURT: These are separate.

20 MS. MCGREGOR: These are separate. I went
21 through the --

22 THE COURT: Where in your brief is that set
23 forth?

24 MS. MCGREGOR: I don't have it right in front of
25 me.

1 THE COURT: That's fine. But it's in your
2 briefing on the subject which we got yesterday?

3 MS. MCGREGOR: Yes, it is. And I can -- I
4 actually only have a draft because I was on a plane when
5 that was filed.

6 THE COURT: I understand. So we're are both in
7 the same position. What I'm going to do is I'm going to
8 reserve as to sanctions. And I will, once I have a
9 chance to put that in context, I will consider it. I do
10 think it was a poor choice. Whether it's sanctionable or
11 not, I will leave to my review of that specific material.

12 MS. MCGREGOR: Okay. Thank you, Your Honor.

13 THE COURT: Thank you. All right. That brings
14 me to the third of Epic's motions, which is to compel
15 information related to electronic health records products
16 other than Med Mantra. One of those the Court, in a
17 previous order, required be produced. And it seems like
18 the crux of this motion is whether or not it should be
19 limited to that product. Was Apollo Hospitals the
20 subject of the last motion?

21 MR. RICHMOND: DaVita.

22 THE COURT: DaVita. Okay. So is your principal
23 concern now -- I realize that you may view there are
24 others, but to the extent you are aware of them at this
25 point -- is your principal concern with respect to

1 Apollo?

2 MR. RICHMOND: No, Your Honor.

3 THE COURT: Can you tell me -- I'm hesitant to
4 order, as it's described, "broad scope of information."
5 It's a little too vague at this point in the case. I've
6 already indicated in the earlier ruling in the earlier
7 motion that to the extent Med Mantra product was used to
8 develop others that you're at least entitled to knowledge
9 as to however it was used or how it was used with respect
10 to other products.

11 I would like to get discovery to a close, so I'm
12 going to ask you to be a little more specific as to
13 exactly what you think you're entitled to. For example,
14 discovery and inspection of products would only occur
15 after you've established meaningful use of the -- this
16 Med Mantra information. And I'm using that as a stand-in
17 for that part of the Med Mantra product which arguably
18 used Epic information in its development. So what is it
19 exactly that you would want me to order at this point?

20 MR. RICHMOND: I would want you to order them to
21 produce information to us about any of their products,
22 applications, accelerators, anything like that, that
23 potentially could have used Epic's information. We don't
24 know where our -- Epic's information went. If I knew
25 that, I could answer your question with great precision.

1 If I had been able to trace the electronic paper
2 trail from the access to the UserWeb to the ultimate end
3 of that information, where those documents went, and
4 let's say it went to three out of six products, I
5 wouldn't be asking you to let us look at all six
6 products; I'd be asking you to let us look at those three
7 products.

8 But we don't know where the information went
9 exactly. All we know is they call all their stuff
10 *Med Mantra*. That's what they say on their website. It's
11 called *Med Mantra*.

12 We asked them in Interrogatory No. 16, "Tell us all
13 the different electronic kinds of stuff you have."

14 And their answer was, "Go look at our website and
15 that will tell you." So we go back to the website again
16 and it says "Med Mantra," so that's what we know.

17 What they've done now is to take that label of
18 *Med Mantra* and say, "That just applies to this very
19 specific product we developed with Apollo."

20 THE COURT: I've already rejected that with
21 respect to DaVita.

22 MR. RICHMOND: Right. They continue with that
23 distinction in many other parts of the case. In fact I
24 won't say "all," but a great deal of the discovery we're
25 stuck right now with them trying to --

1 THE COURT: I get it. Mr. Robben or perhaps
2 someone else is speaking to this.

3 MR. ROBBEN: This one is me. Your Honor, I
4 mean, obviously the main product at issue is Med Mantra.
5 We've given stuff as to that.

6 THE COURT: And that's obvious. But I've now
7 made clear that to the extent there is use of that same
8 information in developing other products that that too
9 will have to be disclosed. And to the extent that there
10 is proof that it's been used in development of other
11 information, Epic is entitled to discover how it was
12 used. So if that's -- if that's in dispute by TCS, I'm
13 not sure how after the last ruling by the court.

14 MR. ROBBEN: I mean, the DaVita materials have
15 been collected, they're going to be produced. We
16 understood the order.

17 THE COURT: But the same ruling would apply with
18 respect to other products that used Med Mantra as a
19 model. That's the problem with telling people you can
20 just go to a website. Sometimes that means you're stuck
21 with that answer. If the website says that Med Mantra is
22 used in all this other -- in all of these other products,
23 they're halfway to being entitled to inspect those
24 products.

25 MR. ROBBEN: Well, one of the products that

1 we've told them they could see or we'd be happy to
2 demonstrate is an installation at British-American
3 Hospital in Mauritius. We said in our response to their
4 notice of inspection, "It's a Med Mantra product. You
5 can look at it." They've never tried to look at it. I
6 mean, they've looked at Med Mantra; they've never tried
7 to look at that. We've given them --

8 THE COURT: I'm sorry. That is where, in
9 Philadelphia, and what's the name?

10 MR. ROBBEN: No, no. It's in Mauritius.

11 THE COURT: Okay. Mauritius?

12 MR. ROBBEN: Mauritius. We would need to make
13 it available --

14 THE COURT: I apologize. I don't know where
15 Mauritius is at. Is that near anywhere?

16 MR. ROBBEN: It's sort of near Africa,
17 southern -- it's on the southern portion of the coast.

18 THE COURT: My son would be very disappointed in
19 me then. All right. I'm familiar with parts of Africa.
20 Can you help me there?

21 MR. ROBBEN: It's in the southern -- southeast.
22 It's an island.

23 THE COURT: And would they have to go there to
24 inspect it?

25 MR. ROBBEN: We can make it available, as we

1 have with Med Mantra in what the people at TCS call
2 *system integration environment*. And so they can supply
3 it by webcast.

4 THE COURT: I understand environmental or a web
5 version of the product.

6 MR. ROBBEN: Correct.

7 THE COURT: So you're offering that with respect
8 to all of the TCS EHR products that refer to Med Mantra
9 as -- or refer to the Med Mantra approach or software?

10 MR. ROBBEN: Yes. I mean, they reference a
11 cancer institute in Chennai. The cancer institute in
12 Chennai, it's a charitable installation. It's something
13 that TCS did as a pro bono. It's a derivative of
14 Med Mantra, is my understanding, that we could make
15 available in the same type of webex environment.

16 THE COURT: All right. Mr. Richmond, they're
17 bending over backwards to make anything available you
18 want.

19 MR. RICHMOND: They took one baby step
20 backwards, Your Honor. They haven't bent yet. Let me
21 tell you what else we need.

22 THE COURT: Okay.

23 MR. RICHMOND: There is a facility in Kolkata
24 that Mr. Guionnet visited which opened his eyes after he
25 had seen the version of Med Mantra in place at Apollo.

1 He was shocked, thought it had been developed and
2 improved dramatically over a short period of time. And
3 to make sure he was right, he went to the cancer facility
4 in Kolkata that he had seen before to make sure that his
5 image or his memory of the --

6 THE COURT: Without the background, what is it
7 you want?

8 MR. RICHMOND: I want an inspection of the
9 software in use at the Kolkata cancer hospital.

10 THE COURT: All right. And you'll go there to
11 do that?

12 MR. RICHMOND: We'll do whatever it takes, Your
13 Honor.

14 THE COURT: Why can't they have that?

15 MR. ROBBEN: I would need to check the technical
16 aspect just to make sure we can provide it. I know the
17 others. But it's not Med Mantra and the testimony in the
18 case is that it's not Med Mantra.

19 THE COURT: Well, except for one individual in
20 particular who said that he can see the echoing of the
21 same information and an unusual increase in ability. I'm
22 not overwhelmed by that, but it may be enough to get them
23 a chance to inspect it.

24 MR. ROBBEN: If we can make it available --

25 THE COURT: Well, why wouldn't you be able to

1 make it available?

2 MR. ROBBEN: I'm just -- I don't want to commit
3 to you today that I can and then I find out, oh, that one
4 is different and we don't have the right environment.

5 THE COURT: Well, you are going to have to
6 commit to me today, but you can advise me after the break
7 whether or not that can be made available.

8 MR. RICHMOND: Your Honor, there's another one.

9 THE COURT: I imagined there was. I wasn't
10 precluding others. What is that you --

11 MR. RICHMOND: After Mr. Guionnet went to
12 Apollo, he went to Kolkata. He went to the headquarters
13 of the Med Mantra team in Hyderabad, India. And there he
14 was shown on a laptop computer, he got what was called a
15 *deep dive* of Med Mantra. And in the course of describing
16 for him how great Med Mantra was, he was shown a great
17 deal of information on a laptop computer with very many
18 layers of comparisons and contrasts and very rich detail
19 of information comparing Med Mantra and Epic and
20 essentially showing how Med Mantra now looked a lot more
21 like Epic. That --

22 THE COURT: This is different from the -- your
23 argument is you don't know if it's different than this
24 Exhibit 5 that had been the subject of our earlier
25 discussions?

1 MR. RICHMOND: Mr. Guionnet testified that that
2 comparative analysis, which has got an exhibit sticker of
3 39, was something that appeared to him to be a very
4 boiled down or --

5 THE COURT: I think I referred to it as Exhibit
6 5 in the last transcript. So rather than confuse things,
7 we're going to continue to refer to it as Exhibit 5 for
8 purposes of the Court.

9 MR. RICHMOND: Very good, Your Honor.

10 THE COURT: But in any event, his testimony was
11 that what he described here, the deep dive --

12 MR. RICHMOND: Yes.

13 THE COURT: -- in Med Mantra, was more
14 substantial than what is an exhibit here?

15 MR. RICHMOND: Much much more substantial. And
16 that deep dive at Med Mantra, so far as we understand it,
17 is showing new products which they call *HIS*, and maybe a
18 couple of other names, which are just now being developed
19 and maybe are ready to be implemented at some new
20 facilities, but our understanding is they have not yet
21 been. So we need to go to Hyderabad and get our own deep
22 dive like Mr. Guionnet did.

23 THE COURT: All right. Mr. Robben.

24 MR. ROBBEN: We've made the TCS HIS
25 demonstration available. We've produced documents as to

1 TCS HIS. We've asked about whether or not this laptop
2 with this other comparison exists and no one knows what
3 that is. No one -- it's -- it doesn't exist.

4 THE COURT: It doesn't exist.

5 MR. RICHMOND: Maybe not today, Your Honor, but
6 that's not the testimony under oath of Mr. Guionnet, who
7 has revealed many things that we've been able to track
8 down and prove to be completely true. He said there was
9 such a laptop; he saw it; he described what was on it.

10 THE COURT: Well, that would be the subject of a
11 different motion as we approach trial --

12 MR. RICHMOND: Yes, I understand.

13 THE COURT: -- and maybe the subject of a jury
14 instruction at the appropriate time in the case.

15 MR. RICHMOND: Yes. Right.

16 THE COURT: But the representation is it doesn't
17 exist. I'm not going to order it to be produced. If you
18 can establish that it does exist or that it did exist to
19 the Court's satisfaction, then obviously there would be
20 serious consequences to that. But I can't -- I'm not
21 going to order it if it doesn't exist.

22 MR. RICHMOND: I understand, Your Honor. With
23 respect to --

24 THE COURT: I won't do that without prejudice.
25 If you, during your discovery in India, are able to

1 establish its existence through other witnesses or
2 elsewhere, I'll certainly revisit that and impose
3 sanctions as appropriate.

4 MR. RICHMOND: I understand, Your Honor. With
5 respect to these inspections of the different places
6 where Med Mantra varieties have been implemented or have
7 been developed, one thing we will need is the appropriate
8 documentation ahead of time to understand how those work
9 and how they were developed. And that comes a lot in the
10 form of what's called *release notes*.

11 And, for example, with respect to the inspections
12 that were just referenced, which was the inspection of
13 the Apollo hospital system and the HIS system, yes, we
14 took an initial inspection of those because we felt like
15 we just should and we needed to. But we reserved our
16 objection, which was you have not produced all the
17 release notes that we need to fairly evaluate those
18 systems. So what we need is the appropriate
19 documentation and information given to us before we do
20 those inspections.

21 THE COURT: Do you have an independent expert
22 who can review those notes?

23 MR. RICHMOND: Yes.

24 THE COURT: In other words, someone who's not
25 affiliated with Epic or isn't working with Epic?

1 MR. RICHMOND: We have a retained expert.

2 THE COURT: That's what I'm talking about.

3 MR. RICHMOND: Yes, we do have a retained
4 expert.

5 THE COURT: And that retained expert doesn't do
6 regular work with Epic?

7 MR. RICHMOND: No. He's been retained as an
8 outside third-party consultant, not an Epic employee who
9 would be preparing and has prepared.

10 THE COURT: All right. I'll hear briefly,
11 Mr. Robben, but I don't know why you shouldn't be
12 required to produce in advance of each inspection the
13 release notes attorney's eyes and the independent
14 expert's only.

15 MR. ROBBEN: We can do it.

16 THE COURT: All right. Then that shall be done.
17 You need that a week before inspections, 14 days, what?

18 MR. RICHMOND: 14 days would be preferable, Your
19 Honor.

20 THE COURT: All right. So 14 days before any of
21 these inspections you will provide, on the circumstances
22 I've just ordered, the release notes for that product or
23 facility, as appropriate.

24 MR. RICHMOND: And again, Your Honor, I don't
25 want to get caught in, you know, a fine parsing of words.

1 When we say the *release notes*, it's the development
2 documents, what was happening as the product was being
3 developed. Sometimes it's called *release notes*.
4 Sometimes it's called *development plans*.

5 THE COURT: You're not going to be caught in
6 word play, because if you feel like you haven't had
7 produced what you're entitled to -- and I agree it should
8 be whatever background information -- either side is
9 welcome to come back to the Court. I will be available
10 and we'll hold an immediate conference call to make sure
11 that after you've met and conferred, and by that I mean
12 you've written or called and asked for clarification and
13 have come -- have realize you disagree, either side is
14 welcome to get me on the phone and we'll resolve that. I
15 don't expect this to delay completion of discovery and I
16 don't see why it should.

17 MR. RICHMOND: Thank you, Your Honor.

18 THE COURT: All right. Was there anything more
19 with respect to this motion to compel?

20 MR. RICHMOND: I don't think so, Your Honor.

21 THE COURT: All right. What we'll do is we'll
22 take our break now. We'll break for 15 minutes. When we
23 return I will take up the two remaining issues, which are
24 what disclosures will be made with respect to the Loeb
25 investigation or subset of investigations and, to the

1 extent applicable, other outside documents had by virtue
2 of outside counsel's investigations that are the subject
3 of the second motion we addressed today, Docket 256
4 concerning the Rule 30(b)(6) deposition and compelling
5 documents. I will also then hear from the parties if
6 there's anything more that is appropriately addressed
7 today.

8 Before we take our break, I believe I have a couple
9 of documents that hopefully you can provide me. And so
10 immediately after we take our break, I'd ask you to
11 approach and provide those to me. And I'll ask plaintiff
12 if there's anything else you want to address today.

13 MR. RICHMOND: Yes, but we can do it after the
14 break, Your Honor. I specifically would like to address
15 the issue you raised at the last hearing, which was in
16 terms of where is information kept and how can we get at
17 it. We do have some clear ideas about what TCS should
18 have done electronically to find the people who accessed
19 the UserWeb, where the information went and how it was
20 used. And I'll describe more of that after the break.

21 THE COURT: All right. I would encourage you --
22 I assume you've already had that discussion with opposing
23 counsel, but I would encourage you to have it again at
24 the break to see if it can't be refined. It may not be
25 maybe on the scope of this hearing, but I'll certainly

1 hear the nature of the disagreement. Anything more that
2 Tata wants to raise -- TCS, I should say?

3 MR. ROBBEN: We have some discovery issues.
4 Epic served some supplemental discovery.

5 THE COURT: If you have discovery issues, they
6 should be the subject of a written motion.

7 MR. ROBBEN: Okay.

8 THE COURT: And that may be my response as well
9 with respect to this other aspect. But we will take
10 up -- I will hear other matters that the parties may wish
11 to raise. What I really meant was if there's some key
12 issue that you had wanted to make sure I was addressing.
13 So we'll take our break now. We will reconvene at 11:15.
14 And we are off the record.

15 (Recess at 11:02 a.m. until 11:15 a.m.)

16 THE COURT: All right. I do have the copy of
17 the assessment report as well as the Kaiser report, the
18 latter being provided by Epic and is also Document 269 --
19 Document No. 269-12 in this case. The full report, which
20 is now in the Court's possession and will not yet be --
21 well, I may end up docking it under seal, but I will not
22 require a disclosure today because I understand that
23 Ms. La Mar is not available; is that correct?

24 MS. MCGREGOR: We've contacted her office and I
25 spoke with her assistant who told me she's on a flight

1 right now from New York to Los Angeles.

2 THE COURT: So what you will do is coordinate
3 with opposing counsel and have her available for a
4 telephonic conference call with the Court on Monday at a
5 time convenient to the parties.

6 At this point perhaps, Joanne, you could confirm. I
7 don't think I have anything on my calendar other than
8 something perhaps at one o'clock. But other than one to
9 two -- actually, I can do it here. I apologize.

10 THE CLERK: There's nothing on.

11 THE COURT: Yeah. So you can choose --
12 actually, you can choose anytime during the day
13 convenient to the parties and to Ms. La Mar. I would ask
14 that you also arrange to have Mr. Mohanty on that same
15 call. And we will take up the question of waiver of
16 portions of this report.

17 It looks like, just for the Epic's information, it
18 looks like the Kaiser report that has been disclosed
19 includes all of the relevant information with respect to
20 the assessment of access to Epic that is contained in the
21 report itself. There are two appendices or described as
22 annexures, A and B. One contains *Details of discussion*
23 *of various teams* and B being *Team interviewed*.

24 And I'll simply ask, Mr. Mohanty (*sic*), if you
25 could, do you have a copy of your report? Just to

1 confirm, in the -- is there any way to discern, in
2 Annexure A, which portions of the -- well, it appears on
3 the first page -- I'm sorry, the second page of Annexure
4 A, because it's two-sided -- I don't know if you have a
5 two-sided copy or not -- is a summary of your discussions
6 with the Kaiser teams, the first being the discussions
7 with TCS Kaiser Onsite team and then the second being the
8 discussions with Kaiser Offshore team. Am I reading
9 those accurately?

10 MR. MENON: Yes.

11 THE COURT: So, in other words, this is
12 information that you gathered in discussion with Kaiser
13 individuals?

14 MR. MENON: The team working for Kaiser; yes,
15 sir.

16 THE COURT: All right. That wasn't appended,
17 and no criticism and to reason why it should have been,
18 to the information you gave directly to Kaiser. But it
19 does reflect your actual discussions with Kaiser
20 individuals, correct?

21 MR. ROBBEN: Your Honor?

22 MR. MENON: Yes, the TCS team working for
23 Kaiser.

24 THE COURT: Right. Okay. I am not going to
25 order today, but I am inclined to think that at least

1 that will be disclosed once I have a chance to explore
2 this further. And counsel for TCS should be aware that
3 that's the Court's inclination.

4 I am also reserving on whether or not this report is
5 subject to privilege, whether or not the disclosure of a
6 substantial portion of this report to Kaiser constitutes
7 a waiver of privilege, whether or not the use of this
8 report in preparing the summary documents for the
9 30(b)(6) -- and I haven't made a comparison, so I can't
10 say this is even really applicable -- but as to whether
11 or not its use in preparing the reports that were
12 disclosed could constitute a waiver; and really, from the
13 Court's point of view, most importantly, whether or not
14 an appropriate sanction is to require production of this
15 report.

16 I will reserve on all of those until I have heard
17 further from Ms. La Mar and perhaps a little further from
18 Mr. Mohanty and I will decide those on the -- well,
19 either during or shortly after the call on Monday, as
20 well as the larger question as to whether -- well, I
21 think first, whether there is such a thing as a Loeb
22 report and whether there's any appropriate disclosure of
23 some or all of that report or the work product prepared
24 by Loeb & Loeb.

25 I believe the only other document I need is the one

1 that is required to be filed by the end of the day under
2 seal, although I may break that seal if it's simply a
3 straightforward engagement letter, would be the
4 engagement letter between Loeb & Loeb and TCS.

5 So that is -- I'll just ask both sides if there's
6 anything further. And thank you again, Mr. -- you've
7 been very patient with me and I appreciate it. I will
8 ask both sides if they have anything more with respect to
9 the motions that are before the Court this morning.
10 We'll begin with plaintiff.

11 MR. RICHMOND: Yes, Your Honor.

12 THE COURT: I was afraid that would be the
13 answer.

14 MR. RICHMOND: Don't be afraid, Your Honor.
15 You'll like it. I believe, based on the correspondence
16 that we see in the email traffic, that the investigation,
17 whatever it was that was being done in the early stages
18 by Loeb & Loeb, at least with respect to Mr. Guionnet's
19 allegations, was being done by Curt Bajak.

20 So my only recommendation is if the Court is going
21 to convene a conference call and trying to have all the
22 necessary people on that call who might be able to answer
23 questions about what that relationship was --

24 THE COURT: I understand. And I think that's
25 probably appropriate. He should be available to

1 participate as well. I should tell you, too, this
2 assessment report that was provided by Mr. Mohanty and
3 his team to Ms. La Mar is dated August 22nd, 2012. I
4 assume that should have been 2014?

5 MR. MENON: Correct.

6 THE COURT: But otherwise that was the date,
7 August 22nd, 2014.

8 MR. RICHMOND: Another item, Your Honor.

9 THE COURT: I'm just asking about the motions at
10 this point.

11 MR. RICHMOND: Yes. And this relates to the
12 motions.

13 THE COURT: Very good.

14 MR. RICHMOND: Before our break you had ordered
15 TCS to provide the necessary documentation before the
16 inspections. We talked about a 14-day time frame. Our
17 view is that it would be much better, given the holiday
18 season and everything else that's happening, if we could
19 have all of those documents 14 days from now so that we
20 can get properly prepared for those inspections. Instead
21 of waiting to see when the inspection happens to get
22 scheduled and then backing up 14 days, it would be
23 crisper and better.

24 THE COURT: Have you discussed that with
25 counsel?

1 MR. RICHMOND: I did not have a chance to
2 discuss that. I did discuss our other --

3 THE COURT: All right. Here's what I'm going to
4 require: that you confer and see if you can reach an
5 agreement as to the timing of those disclosures -- I
6 don't know what it entails -- but if you can reach
7 agreement on a reasonable time.

8 I certainly agree it would be extremely helpful,
9 going into the holidays, that you make every
10 accommodation to get them to them in advance rather
11 than -- nothing has worked very well in this case by
12 waiting for a trigger date, so you should confer. If you
13 can't reach agreement, then you can advise me on Monday.

14 MR. RICHMOND: Very good.

15 THE COURT: Very well. Was there anything more
16 with respect to the motions?

17 MR. RICHMOND: No. There's one little
18 housekeeping matter that's not these three motions and we
19 can work that out later.

20 THE COURT: We'll come back to that. Fine.
21 Anything more with respect to the motions for the
22 defendant?

23 MS. MCGREGOR: Just one point, Your Honor. You
24 had stated a few minutes ago that there was a question as
25 to whether the report that we had provided to you for

1 your in camera review was used in preparing the Rule
2 30(b)(6) documents and witness, and it was not. That was
3 the -- there's two separate -- I mean, there's not two
4 separate things, but that that document was not used. It
5 was the recent look-back engagement by TCS to identify as
6 many additional people as possible. So the Loeb
7 document, the document prepared for Loeb, was not
8 involved in that.

9 THE COURT: And you know that, Ms. MacGregor,
10 because you prepared those three documents to assist?

11 MS. MCGREGOR: In working with others and having
12 input from others, but I did prepare those documents.

13 THE COURT: All right. I'll take that
14 representation. We will take that part of the waiver
15 question off the table for Monday.

16 MR. ROBBEN: Your Honor, two other points.

17 THE COURT: Related to the motions?

18 MR. ROBBEN: Yes, yes.

19 THE COURT: Yes.

20 MR. ROBBEN: For the call on Monday, I think you
21 had said you wanted Mr. Mohanty on the call.

22 THE COURT: I did.

23 MR. ROBBEN: This is Mr. Menon. Mr. Mohanty
24 performed the memo.

25 THE COURT: Oh, I'm sorry. Exactly. I should

1 have said Mr. Menon, Chief Security Officer. And my
2 apologies. I just thought maybe I was butchering your
3 name earlier and I -- but, in any event, you're exactly
4 right. It is Chief Security Officer Menon who should
5 participate. If nothing else, I think Epic would agree
6 that Mr. Mohanty is not the person who needs to be on the
7 call. And so I appreciate that clarification. Thank
8 you.

9 MR. ROBBEN: Your welcome. The other point I
10 wanted to raise in terms of when the materials will be
11 produced, we have no objection to trying to produce them,
12 you know, quickly before the holidays.

13 I just would point out there was a huge flood in
14 Chennai this week and it's flooded out the entire city.
15 Many, if not all, of the TCS offices are closed.
16 Mr. Menon can talk to that. It could impact our ability
17 to do this. And I just --

18 THE COURT: And just so we're clear, "to do
19 this," you're referring to the specific coding material,
20 or I think we've been calling it -- I should say Epic has
21 been calling it --

22 MR. ROBBEN: The release notes and such.

23 MR. RICHMOND: Release notes, Your Honor, and
24 design and development documents.

25 THE COURT: Design and development documents.

1 You're saying that there could be a delay. Is that
2 information backed up somewhere on *the cloud* or
3 otherwise?

4 MR. MENON: I think what we heard from the team
5 was they wanted information about the building in
6 Kolkata. That's not impacted.

7 THE COURT: I'm sorry. Predicting --

8 MR. MENON: There is a cancer hospital in
9 Kolkata for which they asked for information, if that's
10 available. That's not impacted by the deluge that has
11 happened in Chennai.

12 THE COURT: No. I was asking, with respect to
13 Chennai, is that information that would be normally
14 backed up?

15 MR. MENON: No. None of our customers host
16 anything on *the cloud* and neither do we.

17 THE COURT: All right. Very good. Then I would
18 encourage you to discuss that and if some portion of the
19 disclosure is going to be delayed as a result that you
20 reach whatever accommodation you can or advise me if
21 there's an issue.

22 MR. MENON: Sure.

23 THE COURT: Very good.

24 MR. MENON: Thank you.

25 THE COURT: Further clarification then, Mr.

1 Robben. Thank you.

2 MR. RICHMOND: Your Honor -- oh, I'm sorry.

3 THE COURT: I am asking the defense if there's
4 anything more.

5 MR. ROBBEN: No.

6 MR. RICHMOND: Your Honor, what was said raises
7 one sort of final point then, which is this is a tech
8 company. And so whether it's on *the cloud* or something,
9 I can't imagine they don't have backups sufficient. But
10 we'll find out what they say on that.

11 But it does lead me, to make sure that I haven't
12 foreclosed myself somehow in our later discussion;
13 because our 30(b)(6) motions, in the Court's view, have
14 not been entirely successful and we're trying to get
15 individual depositions and documents and information, I
16 want to make sure that when we give you our proposal for
17 how we can finally figure out, once and for all,
18 electronically who accessed the UserWeb, what documents
19 were downloaded, where did they go, how were they used,
20 that we need that to be done very quickly so that when we
21 go to India and take these depositions, we will have the
22 information we finally need.

23 THE COURT: And have you discussed that now with
24 TCS?

25 MR. RICHMOND: I have.

1 THE COURT: And is there a point of dispute, in
2 your view?

3 MR. RICHMOND: I believe I just don't have an
4 answer yet. I don't know if this is the right time, but
5 I'm prepared to describe to you my proposal and why.

6 THE COURT: I think it's within the realm of
7 these three motions because I am trying to find a way to
8 complete discovery in an orderly fashion. And since one
9 of the two key issues for your client is who obtained
10 access to the information and that's what you're
11 addressing, I think it's appropriate to take it up.

12 MR. RICHMOND: May I approach the podium then,
13 Your Honor, and spend a little time doing that? It will
14 take just a few minutes.

15 THE COURT: Yes.

16 MR. RICHMOND: Thank you. A key question is who
17 accessed Epic's information in the UserWeb. Four people
18 were identified in the interrogatories.

19 THE COURT: We don't need to go through the
20 history of that and how it developed. And I'm not in a
21 position today to decide, of the additional people who
22 have now been named, how significant or inappropriate it
23 was that they weren't named earlier. But if you have a
24 point as to what relief you think would move this along,
25 that's what I'd really like to hear.

1 MR. RICHMOND: Yes. The number is up to 27. It
2 could go to scores or hundreds.

3 THE COURT: You know, that's a meaningless
4 number to the Court at this point. It's a rhetorical
5 point, but it doesn't help me. So if you have something
6 specific --

7 MR. RICHMOND: Let me try to be more specific.

8 THE COURT: Thank you.

9 MR. RICHMOND: The way TCS has approached
10 figuring this out so far has just been essentially
11 witness interviews and it's not electronic.

12 THE COURT: And you think there is a much more
13 efficient way --

14 MR. RICHMOND: I do.

15 THE COURT: -- to accomplish that and it can be
16 done by a company whose expertise is in information
17 gathering and discovery and you have a proposal.

18 MR. RICHMOND: That is my proposal, Your Honor.
19 There are companies like that. They make --

20 THE COURT: That's not a proposal; that's just a
21 statement. What do you want me to order?

22 MR. RICHMOND: I want you to order, in the way
23 of a special master or a monitor or somebody who can
24 actually figure this out electronically, to go figure out
25 who accessed the information, what was downloaded, where

1 it went and what was eventually done with it. And you
2 can do it --

3 THE COURT: Frankly, early on I would have
4 thought that this would have been asked of the Court. I
5 don't know that a special master is required. I think
6 surely Epic has access to experts who would know how to
7 do this and that that would have been proposed. We're
8 late in the game, but it's not entirely your fault that
9 we're late in the game.

10 So if you're now proposing that you -- that one of
11 your experts be given access -- it would have to be a
12 non-Epic person -- be given access to their information
13 in order to make a discovery, including being able to
14 consult with -- I don't know if Mr. Menon has been given
15 too many tasks already today, but he seemed like he might
16 be the perfect person to coordinate and to come up with
17 appropriate search terms -- that seems like an
18 appropriate approach.

19 MR. RICHMOND: That's what we're asking. I can
20 put more definition on it if you would like. We need an
21 outside firm.

22 THE COURT: I understand. When you say you
23 "need an outside firm," you can retain one.

24 MR. RICHMOND: Yes --

25 THE COURT: Right.

1 MR. RICHMOND: -- that's what we would like to
2 do.

3 THE COURT: Okay. You said you were going to
4 put more --

5 MR. RICHMOND: In terms of the process, so
6 there's this ODC. It's supposed to be, I'll call it, a
7 *clean room*. There's three kinds of credentials being
8 used in that ODC. There's Kaiser machines and people
9 were issued credentials by Kaiser to do their work.
10 There are some other machines that we think is really
11 inappropriate called *kiosk* machines, which are TCS
12 machines.

13 When people go over -- and let me add that the
14 Kaiser machines are in a virtual private network, a VPN:
15 You can't get Internet, you can't put memory cards or any
16 of that.

17 The TCS machines, when you go to those, you have to
18 type in your TCS credentials. So every person who ever
19 used one of those kiosk machines has to identify
20 themselves and who they are and it starts an electronic
21 record of what's happening on those machines. It was on
22 those machines that Epic's UserWeb was accessed. And
23 then people are typing in yet a third set of credentials,
24 a lot of times it was Ramesh Gajaram's credentials, to
25 get into the UserWeb.

1 Documents are taken off the UserWeb, put on those
2 kiosk machines, and then who knows where they went;
3 because those kiosk machines, we understand, gives access
4 to not just the Internet, but TCS email, TCS servers, TCS
5 shared drives or whatever it is that gives access to
6 their computer system.

7 So when we hire somebody to do this, they are
8 probably going to want to know where are all the kiosk
9 machines from mid 2011 to mid 2015, give me images of
10 those; let me talk to people to see, once we have that
11 information, where possibly does this information go;
12 describe the server system, describe how you save
13 documents.

14 THE COURT: I would have thought this would have
15 been done early in discovery.

16 MR. RICHMOND: We have tried with every other
17 discovery device except this.

18 THE COURT: It just goes without saying. You're
19 exactly right. This would have been the way to do it
20 from the beginning. Every other discovery device has all
21 kinds of limitations. This would have given you
22 hopefully definitive answers or at least the best
23 complete answer to the question you were posing. In any
24 event, I'll hear from opposing counsel on this proposal.

25 MR. ROBBEN: Your Honor, there's -- we don't

1 have an objection to cooperating with them on this,
2 although I think there might be limits to what we can
3 provide them just because of the passage of time. I
4 mean, for example, mid 2011 to mid 2015, I'm not sure if
5 we have the kiosk machines for that whole entire period
6 of time.

7 THE COURT: You may not have the machines, but
8 you may have the underlying data stored somewhere.

9 Mr. Menon, do you know if that information -- first
10 of all, I guess the simplest question is, did you do that
11 as part of your follow-up investigation; did you attempt
12 to discover who had access to it?

13 MR. MENON: We did look at that machine to see
14 if there was any Epic information on that machine at that
15 point in time and we did not see any.

16 THE COURT: You didn't find it on the machine,
17 but did you look for records of who accessed -- went
18 into, coded into or entered?

19 MR. MENON: We have that information.

20 THE COURT: You have that information?

21 MR. MENON: Yes.

22 THE COURT: Okay. So that's still available. I
23 guess I'm not sure why that wouldn't have been produced
24 in response to discovery requests already.

25 MR. ROBBEN: I'm not sure what the information

1 is that --

2 THE COURT: Who it is who actually accessed,
3 with using TCS credentials, into the Kaiser database to
4 get to Epic.

5 MR. ROBBEN: We don't have information that
6 shows this TCS person accessed UserWeb sharing
7 Mr. Gajaram's credentials.

8 THE COURT: Is that correct?

9 MR. MENON: Yes. I have information about who
10 logged onto that machine, but who accessed UserWeb from
11 there is not available.

12 THE COURT: All right. And you suspect that's
13 available somehow?

14 MR. RICHMOND: I believe it is, Your Honor, but
15 I don't know. That's the purpose of the investigation
16 that needs to be done.

17 THE COURT: Here's what I'm going to require:
18 I'm going to require that you designate a non-Epic
19 affiliated expert, disclose it as soon as you're able to
20 to counsel for the Kelley law firm. And then at that
21 point that person will discuss the issues, without
22 counsel involved, as to what's available and what can be
23 discovered, directly with Mr. Menon.

24 MR. RICHMOND: Very good, Your Honor. There
25 will be some lingering issues toward the end of this

1 process, I don't know that they need to be resolved
2 today, in terms of --

3 THE COURT: It doesn't sound like they can be
4 resolved today.

5 MR. RICHMOND: But let me just preview two tiny
6 issues. One is Loeb & Loeb was hired in May of 2014,
7 we've just learned in this briefing. And so we will be
8 very desirous of knowing what kind of litigation holds
9 went out and all that because they say they were
10 anticipating litigation at that time. So we need to know
11 what kiosk machines still exist and when they stopped
12 being in existence as part of the process.

13 THE COURT: Have you posed discovery on that
14 subject?

15 MR. RICHMOND: We have. The answers haven't
16 come back. The answers haven't come back yet.

17 THE COURT: Well, then it's premature.

18 MR. RICHMOND: And then secondly, Your Honor, in
19 terms of the cost of this exercise, we will come to you I
20 think in a later iteration to talk about that issue.

21 THE COURT: You're wasting your time. You could
22 have done this at anytime during discovery. Why would
23 I -- why would that be a cost to them?

24 MR. RICHMOND: Your Honor, this investigation,
25 frankly --

1 THE COURT: I mean, if your point is that you
2 specifically asked for this information in discovery
3 requests --

4 MR. RICHMOND: Yes.

5 THE COURT: -- and it was not provided --

6 MR. RICHMOND: Correct.

7 THE COURT: -- I will hear that motion.

8 MR. RICHMOND: Okay.

9 THE COURT: But the way to have dealt with this
10 efficiently would have been for you to specifically have
11 sought discovery on this subject matter early on in the
12 more efficient way.

13 MR. RICHMOND: Your Honor, with the benefit of
14 hindsight, we maybe wish that we had. We asked in every
15 which way that we could to get this information. We've
16 been trying to get it for a year. This is what we're
17 left with. But I've heard loud and clear that you're not
18 moving the discovery deadline, so I need to do everything
19 I can right now to get that information.

20 THE COURT: Understood. And I will support that
21 effort. And if at some point you want to bring a motion
22 for sanctions because, in your view, it should have been
23 done more efficiently by the defendant, I will certainly
24 consider that, particularly if you can establish that
25 they're very clear requests for information.

1 I'm not sure, perhaps there isn't that information
2 and that's what you're going to discover through this
3 expert. I'm not going to speculate about it.

4 MR. RICHMOND: None of us know until it happens,
5 Your Honor.

6 THE COURT: All right. Any other matters that
7 the plaintiff wanted to raise today, including
8 housekeeping?

9 MR. RICHMOND: Oh, yes, the one housekeeping
10 issue, Your Honor. When we filed our summary judgment
11 brief, we were doing it under a schedule that initially
12 was set by Magistrate Judge Crocker. But then the
13 automatic system produced some different dates. You
14 commented on that and said the different dates could
15 comply. It just puts us in a bad position. It makes our
16 reply brief due on New Year's Eve. And we're asking for
17 a one-week extension until Friday, January 8th, to file
18 our reply brief in support of our own summary judgment
19 motion.

20 THE COURT: That sounds reasonable. Any
21 objection to that?

22 MR. ROBBEN: Of course not.

23 MR. RICHMOND: All right. Thank you.

24 THE COURT: All right. For the defense,
25 anything further you wanted to address? And you may sit

1 down again, Mr. Menon. With apologies, I may ask you up
2 again. I hope not.

3 MR. ROBBEN: The only question I had is on this:
4 They're going to appoint an expert, we're going to talk
5 to the expert.

6 THE COURT: No, you're not going to talk to the
7 expert. Mr. Menon and the expert will talk after he's
8 been disclosed and you have a chance to vet whoever that
9 person he or she is.

10 MR. ROBBEN: To the extent there's disputes that
11 arise during that, are those things we bring to you?

12 THE COURT: Disputes being what? There's not
13 going to be any dispute that Mr. Menon will be made
14 directly available, without counsel's participation, to
15 discuss with that expert what information is or isn't
16 available within the system.

17 And if they then make a request to you that they
18 want this information done, whatever -- however the
19 expert styles it, and you disagree, that would be a
20 disagreement you'd bring to me. But until they've talked
21 and he's been satisfied -- and I expect full cooperation
22 from Mr. Menon, which he's done very well today already,
23 and I would expect nothing less in his discussions with
24 this independent expert to complete the discovery.

25 MR. ROBBEN: Well, I was leaning more toward the

1 latter; that not that we object to Mr. Menon talking,
2 although I would like to participate.

3 THE COURT: You're not allowed to participate.
4 It's going to be between those experts.

5 MR. ROBBEN: Can I be listening?

6 THE COURT: No, no. They will have a discussion
7 about what information is available and the lawyers
8 aren't going to be involved.

9 MR. ROBBEN: Okay. So Epic --

10 THE COURT: Neither side. There will be -- I
11 said "the lawyers." I didn't mean one side; I meant all
12 lawyers. The only people that will be in those
13 discussions, however they're arranged, will be the
14 independent expert and Mr. Menon for the purpose of
15 determining what information may be efficiently obtained
16 from data available to TCS.

17 MR. ROBBEN: Thank you.

18 THE COURT: Anything further then for today?

19 MR. ROBBEN: No.

20 THE COURT: All right. I'll await an indication
21 from the parties as to when everyone will be available on
22 Monday and I will await by the end of the day a copy of
23 the Loeb & Loeb engagement letter. I don't think there's
24 any other materials that I need from the parties.

25 I will attempt to reduce to writing those matters

1 which we have resolved today, but that may actually await
2 our discussion on Monday as well.

3 Unless there's something further for the parties, I
4 thank you for your efforts today in trying to advise the
5 Court about where we stand. If I have not said it
6 already, I hope it is clear that I expect full
7 cooperation going forward. And I don't say that just as
8 to TCS, although I do think that more efforts could have
9 been made to date and some of this could have been
10 avoided. I say it to both sides because we are going to
11 have a trial on this matter.

12 I do note in the letter that I received yesterday,
13 which was the oddest request for mediation I've ever
14 received, because it started out with a sentence seeking
15 mediation and then telling me that the other side's case
16 was completely meritless, which is an odd way to approach
17 a court to ask for mediation.

18 But, in any event, we have someone on staff, who is
19 as qualified as any private mediator, to mediate disputes
20 between the parties. He is our
21 clerk/magistrate/mediator, Peter Oppeneer, who's very
22 talented, has tremendous experience; some of it as an
23 elbow clerk, much of it in his capacity as the chief
24 clerk in this court.

25 And I would encourage the parties, if they wish to,

1 to have that discussion. But these are very -- both
2 companies have the ability to hire a private mediator.
3 I'm not going to order mediation by the parties unless
4 there's something to mediate, and the letter itself
5 indicates that there isn't.

6 To the extent that TCS, at this late date, wants to
7 expand this case into a much larger one, I guess they're
8 entitled to attempt to do that, but I can't imagine that
9 there's sufficient time to complete discovery on other
10 claims. And so likely that would be severed if it would
11 become necessary or I will simply require a separate
12 lawsuit. I can't imagine that there's a basis to require
13 that to be litigated in this case. I just -- it's just
14 too late.

15 So with that, I'll look forward to hearing from the
16 parties on Monday. Thank you.

17 (Adjourned at 12:02 p.m.)

18 ***

19

20

21

22

23

24

25

1 I, CHERYL A. SEEMAN, Certified Realtime and
2 Merit Reporter, in and for the State of Wisconsin,
3 certify that the foregoing is a true and accurate record
4 of the proceedings held on the 4th day of December, 2015,
5 before the Honorable William M. Conley, Chief Judge of
6 the Western District of Wisconsin, in my presence and
7 reduced to writing in accordance with my stenographic
8 notes made at said time and place.
9 Dated this 10th day of December, 2015.

10
11
12
13
14
15 _____ /s/

16 Cheryl A. Seeman, RMR, CRR
17 Federal Court Reporter
18
19
20
21

22 The foregoing certification of this transcript does not
23 apply to any reproduction of the same by any means unless
24 under the direct control and/or direction of the
25 certifying reporter.